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I. INTRODUCTION

> Marriage is the very foundation of civil society, and no part of the laws and institutions of a country can be of more vital importance to its subjects than those which regulate the manner and conditions of forming, and if necessary, of dissolving, the marriage contract.[1]

Marriage, as the above statement reveals, is an important institution that affects the status of the parties concerned, as well, of course, as the state interests of the parties' marital residence and pre-marriage domiciliary laws. The focus of this article is to consider the current Anglo-American jurisprudence in relation to the issue of validity of marriage and to suggest that a new twin-centered rationale, derived from interest analysis and depecage principles,[2] ought to be applied to resolve difficulties when the laws of two or more interested jurisdictions present a conflict. Competing policy interests between states lie at the heart of the question of the extraterritorial effect to be accorded to a marriage. There are contrasting sensitivities between societies as to which types of marital unions, for various

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1. Shaw v. Gould, 3 L.R.-E. & I. App. 55, 82 (H.L. 1868).

2. Depecage is used in this context to indicate an ability to "pick and choose" different laws to govern different specific issues. *See* NORTH & FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 56-57 (12th ed. 1992).

eugenic, religious, moral, and economic concerns, impinge upon their policy interests to such an extent that the union should be declared void.[3] The matter of validity of a marriage arises as a preliminary question in a multitude of different situations: immigration; petitions for annulment, divorce and judicial separation; social welfare legislation; succession; matrimonial financial relief; and even in criminal proceedings including those for bigamy, cruelty, desertion, and assault.[4] An added ingredient here has been increased worldwide mobility between countries, which has enhanced the requirements of resolution of essential marital validity questions through application of conflict of law principles. At the very outset it is important to examine the policy objectives, both general and specific, which choice of law rules in this area of law should seek to achieve; the list that follows, mainly derived from decided cases, is not set out in any especial order of priority.[5]

1. Presumption in favor of validity of marriage. The basic policy here is that marriages should, wherever possible, be held valid. This serves to preserve the family ties, with marriage propagated as a desirable enclave for bringing up children.[6]

2. Protecting the reasonable expectations of the parties. It is unjust to upset the parties' expectations by applying a law that they could not

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3. The five main prohibitions are non-age, remarriage after divorce, consanguinity and affinity, polygamy, and lack of consent. Difficulties are exacerbated in that "what might be deemed a mere regulation in one state might be regarded as a matter affecting the morals and good order of society in another." Pennegar v. State, 10 S.W. 305, 308; 87 Tenn. 244, 254 (Tenn. 1889).

4. *See* Peter D. Maddaugh, *Validity of Marriage and the Conflict of Laws: A Critique of the Present Anglo-American Position*, 23 U. TORONTO L.J. 117 (1973).

5. The list is drawn together from a variety of disparate sources. *See* Elliott E. Cheatham and Willis L. M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 969 (1952); Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267, 283 (1966); Hessel E. Yntema, *The Objectives of Private International Law*, 35 CAN. BAR REV. 721, 723 (1957); Willis L.M. Reese, *see Marriage in American Conflict of Laws* in CONTEMPORARY PROBLEMS IN THE CONFLICT OF LAWS 252, 267 (1977); *see generally* T. C. Hartley, *The Policy Basis of the English Conflict of Laws of Marriage*, 35 MOD. L. REV. 571, 571-72 (1972); *see* Sir Peter North, *Development of Rules of Private International Law in the Field of Family Law* in ESSAYS IN PRIVATE INTERNATIONAL LAW 109-169 (1992).

6. *See* ALBERT A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 378-89 (1962), for a discussion on the influence of this policy in private international law in the United States. This policy is more important when the validity of a marriage is being considered retrospectively. It is a factor regarded by Swan as significant enough to presumptively override all others. *See* John Swan, *A New Approach to Marriage and Divorce in the Conflict of Laws*, 24 U. TORONTO L.J. 17, 27, 39-41 (1974).

reasonably have contemplated.[7] On the bases of fairness and justice, it may also be egregious to alter an assumption, on which the parties have conducted their lives for a number of years, subject to the proviso that there are indeed reasonable grounds for their expectations.

3. Certainty and predictability. It is obviously desirable that the parties should know, or be able to ascertain, without the necessity of litigation, the applicable law.[8] This consideration is of particular importance in the field of marriage where the interest of the parties may be of an essentially prospective nature and involves the question; "Do I have capacity to enter into this marital union?" This factor points toward the need for definite choice of law principles, not vague or flexible rules.

4. Convenience. As the English Law Commission has stated the choice of law rules should point to a law that is convenient for the parties and about which they can readily obtain professional advice.[9] It is important to take into account here the convenience of marriage officials in the country of celebration. Such officials cannot reasonably be expected to solemnize marriages in accordance with the law of other countries. The implication behind this policy, paying adherence to the convenience of courts and litigants, will predominantly favor the application of the law of the forum. The natural tendency will be to prefer forum law in the absence of compelling reasons to the contrary, since presumptively counsel and judges have more intimacy with their own practices.[10]

5. Eugenic concerns and maintenance of family stability. The rules on consanguinity and affinity may be supported on these grounds. The prevention of inter-breeding may be predicated on eugenic or genetic arguments; affinity rules disallowing marriages between stepmother and stepson or between adoptive siblings may be predicated upon irreparable disruption to family stability.[11] Non-age rules also relate to family stability arguments.

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7. *See* RESTATEMENT (SECOND) §. 6 (2) (d).

8. *See* Peter M. North, *Development of Rules of Private International Law, in* 166 RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 43-45 (Sijthoff & Noordhoff, eds., 1980).

9. *See* Law Commission Working Paper No. 89, *Private International Law: Choice of Law Rules in Marriage* (1985), para. 2.35 (hereafter L.C.W.P. No 89).

10. *See* Hartley, *supra* note 5, at 571.

11. *See* Victor Bailey and Sarah McCabe, *Reforming the Law of Incest*, [1979] CRIM. L.R. 749, 757-58; *see* S. M. CRETNEY, PRINCIPLES OF FAMILY LAW 38-39 (3d ed. 1979); and *see generally* Alexander Morgan Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618 (1979) (discussing civil liability for genetic counseling).

6. Moral, religious, and cultural infrastructures. These elements are the bases behind rules preventing same-sex marriages, bigamy, and polygamy. They also are significant in the application of consent grounds in that marital unions entered into through force or duress may contravene the sensitivities of the relevant society.

7. International uniformity of decisions. The aim here is to present "limping marriages," regarded as valid in one country but not in another, and to promote uniformity of status. This points to the exclusion of the law of the forum as the applicable law as that is the one law that makes it impossible to achieve uniformity.

8. Domestic policy of foreign law. By reason of comity or internationalism, the choice of law rules of the forum should give due regard to the interest of a foreign country, in the application of its own laws.

The experience on both sides of the Atlantic has been to apply broad jurisdiction, selecting rules to choice of law for essential validity of marriage, without regard to the underlying specific issue at hand. The revolution in the United States in choice of law that has been applied to contract and tort, involving the adoption of interest analysis principles, has left the family law area relatively untouched.[12] There is a certain irony in this regard, as it is suggested in this article that the question of marital validity, impacting on personal status, and identifiable state interests in regulating parties who establish matrimonial residences within their borders as well as marriages effected by their domiciliaries, is ripe for the application of a modified interest analysis theory. What is propounded is a more restrictive adoption of interest analysis, avoiding the excessive judicial particularistic intuitionism, the special brand of casuistic "Khadi-justiz" (ad hoc decisions deduced from mystical references to interests), and dated rule-scepticism that has plagued the United States experience in both contract and tort.[13] It is argued that interest analysis has a place in the formulation of rule specific principles to choice of law that enables the parties to prophylactically

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12. *See generally* Michael Davie, *The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws,* 23 ANGLO-AM. L. REV. 32 (1994).

13. For a selection of the expanding material criticizing interest analysis, *see generally* Frederich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis* 32 AM. J. COMP. L. 1 (1984); Harold L. Korn, *The Choice-of-Law Revolution: A Critique,* 83 COLUM. L. REV. 772 (1983); J.J. Fawcett, *Is American Governmental Interest Analysis the Solution to English Tort Choice of Law Problems?,* 31 INT'L & COMP. L.Q. 150 (1982); TH. M. DE BOER., BEYOND LEX LOCI DELICTI (1987); LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS (1991).

determine the outcome of competing state validating or invalidating rules to particular choice of law concerns.[14]

A panacea to the current vagaries of English choice of law doctrine would be to adopt a form of depecage analysis to marriage validity in which choice of law issues, rather than lumped together at present, are split down into identifiable and different groups of issues. Interest analysis can then be combined with this depecage splitting to promulgate specific and certain rule formulation. Interest analysis can be directed at the real competing state interests that are in conflict, disregarding false conflicts that are revealed, and consequently addressing the inherent policy grounds that lead to invalidation of marriage.

Thus, it is argued that this twin approach can beneficially advance the significant policy objectives as outlined, specifically adopting an overall presumption in favor of marriage, protecting the reasonable expectations of the parties, an acceptable degree of certainty and predictability, in tandem with convenience, whilst also promoting international uniformity of decisions. An extended application will be given to Baade's stark proposal that the solution to essential validity matters for marriage is to simply focus on the, "purposes, policies, aims, and objectives of each of the competing local law rules, everything else is material only because it is reflected in these rules as teleologically interpreted."[15] Before expanding on these proposed new rule formulations it is necessary to review the current parlous state of the law in England and the United States.

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14. For a discussion of proposed application of interest analysis to marital validity in Canada, *see generally* Maddaugh, *supra* note 4; Swan, *supra* note 6. In the English context, *see generally* Richard Fentiman, *The Validity of Marriage and the Proper Law,* 44 CAMBRIDGE L.J. 256 (1985); P. St. J. Smart, *Interest Analysis, False Conflicts, and the Essential Validity of Marriage* 14 ANGLO-AM. L.R. 225 (1986); Richard Fentiman, *Activity in the Law of Status: Domicile, Marriage and the Law Commission,* 6 OXFORD J. LEGAL STUD. 353 (1986). In the Anglo-American sphere, *see generally* Peter M. North, *Reform, but not Revolution: General Course on Private International Law,* I Recueil Des Cours 220 (1990); *see* North, *supra* note 5, at 109-169; *see generally* Davie, *supra* note 12.

15. There is a marked paucity of American academic writing on the issue of capacity to marry. *But see* Hans W. Baade, *Marriage and Divorce in American Conflicts Law: Governmental Interests Analysis and the Restatement (Second),* 72 COLUM. L. REV. 329, 378 (1972); *see generally* David E. Engdahl, *Proposal for a Benign Revolution in Marriage Law and Marriage Conflicts Law,* 55 IOWA L. REV. 56 (1969); David J. Fine, *Application of Issue Analysis,* 26 LOY. L. REV. 31 (1980).

II. THE CURRENT STATE OF THE LAW

A. England

From an English perspective, rules about the validity of marriage for choice of law purposes are delineated into two distinct classes: those addressing formal validity and those concerned with essential validity. The former is concerned with the law which governs the ceremony and related procedures required for the valid celebration of a marriage.[16] Issues of formal validity encompass the following matters: the nature of any civil or religious ceremony required, whether a licence to marry must be obtained,[17] the availability of proxy marriages,[18] requirement of parental consent,[19] the need for witnesses and registration, and type of premises where marriages may be celebrated.[20] Essential validity, by way of contrast, focuses on the capacity of the parties to create a personal status of husband and wife.[21] No difficulties exist with the application of English choice of law principles to formal validity. It has been well established since at least the eighteenth century that the formal validity of a marriage is governed by the law of the place of celebration, the *lex loci celebrationis*. This rule is an application of the maxim *locus regit actum*, and was clearly stated by Viscount Dunedin in *Berthiaume v. Dastous*:

> If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage

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16. *See* NORTH AND FAWCETT, *supra* note 2, at 572-586; MCCLEAN, *Morris: The Conflict Of Laws*, (4th ed., 1993) at 149-152; and CLARKSON AND HILL, *Jaffey On The Conflict Of Laws* (1997) at 298-307.

17. *See* Berthiaume v. Dastous, 1930 A.C. 79 (P.C.).

18. *See* Apt v. Apt, 1948 P. 83 (Eng. C.A.). At issue here is the method of giving consent and the question whether the parties must be physically present at the ceremony. However, the reality of consent as distinct from the mode of giving it is not a matter of form.

19. *See* Ogden v. Ogden, 1908 P. 46 (Eng. C.A.).

20. *See generally*, Edward J. Sykes, *The Formal Validity of Marriage*, 2 INT'L & COMP L.Q. 78 (1952); D. Mendes da Costa, *The Formalities of Marriage in the Conflict of Laws*, 7 INT'L & COMP. L.Q. 217 (1958); *see* LENNART PALSSON, MARRIAGE AND DIVORCE IN COMPARATIVE CONFLICT OF LAWS, Ch. 6 (1981); North, *supra* note 8, at 69-77.

21. *See Pennegar*, text accompanying *supra* note 3; *see* Way v. Way, 1950 P. 71 (Eng. C.A.) (lack of consent); R v. Naguib, 1 K.B. 359 (Eng. C.A. 1917) (prior subsisting marriage); Brook v. Brook, 9 H.L.C. 193 (Eng. 1861); R v. Brentwood Superintendent Registrar of Marriages, Ex parte Arias 2 Q.B. 956 (Eng. 1968) (remarriage after earlier divorce).

> according to the law of the place would or would not constitute marriage in the country of the domicile of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicile would be considered a good marriage.[22]

The certainty of choice of law application to matters of formal validity is in stark contrast to the beguiling confusion over issues of essential validity. There are three different theories jousting for control,[23] and this surfeit of options has led, on occasion, to courts engaging in selective 'cherry-picking' of preferred theory to deliver *ad hoc* justice in particularly hard cases. A by-product of this uncertainty has been excessive judicial creativity in an area requiring logical policy analysis of the countervailing issues. The three theories are the dual domicile theory, the intended matrimonial home theory, and the most real and substantial connection theory.[24] It is submitted that each of them has peculiar merits and demerits in application.

1. The Dual Domicile Theory

In accordance with the traditional dual domicile theory, it is necessary to examine the law of each party's domicile at the date of the marriage. Capacity to marry is governed by the law of the parties' ante-nuptial domiciles: each party must have capacity, according to the law of his or her domicile at the time of the ceremony, to marry the other. This approach is associated with Professor Dicey,[25] who added his imprimatur to

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22. Berthiaume, 1930 A.C. at 83. *See generally* Scrimshire v. Scrimshire, 2 Hag. Con. 395 (Eng. 1752); Dalrymple v. Dalrymple, 2 Hag. Con. 54 (Eng. 1811); Warrender v. Warrender, 1835 S. 488 (Scotland); Kenward v. Kenward 1950 All E.R. 297 (Eng. C.A.); R v. Bham 1 Q.B. 159 (Eng. 1966). In *McCabe,* a marriage ceremony was performed in Ghana. The respective parties, Irish and Ghanaian domiciliaries, were absent from the ceremony but the putative husband had sent £100 and a bottle of gin. Relatives from both sides of the union were present who toasted the health of the absent spouses, and distributed the dowry amongst themselves. The marriage, in compliance with African custom, was formally valid under Ghanaian law. McCabe v. McCabe 1 F.L.R. 410 (Eng. 1994).

23. *See* Davie, *supra* note 12, at 32.

24. *See* Davie, *supra* note 12, at 32-7; NORTH AND FAWCETT, *supra* note 2, at 56-7, 587-89; MCCLEAN, *supra* note 16, at 152-55; CLARKSON AND HILL, *supra* note 16, at 307-15.

25. A.V. DICEY, THE CONFLICT OF LAWS 254-55 (8th ed. 1967).

the doctrine, and the balance of English judicial authority supports this rigid jurisdiction-selection reference test.[26]

The theory has a number of advantages. A primary justification is that it promotes certainty. The test is relatively easy to apply in the prospective situation and enables the parties' marital status to be ascertained with certainty at the time of the marriage.[27] Certainty is promulgated in that the test is backward looking to the parties' domiciles before marriage, rather than forward looking to the establishment of a potential marital residence. It comports with common sense to submit marital capacity to legal connections existing at the date of marriage, not a subsequent indeterminate date. This facilitates the task of individuals, such as marriage officials and legal advisers, who are called upon to provide advice as to whether a marriage would be valid if it were to be celebrated.[28]

In principle, the dual domicile theory can be supported in that it submits matters of validity to the personal law of the parties. Marriage itself creates a status and, thus, it seems logical to adduce the validity of that status to the personal law of the parties that will usually have governed their status for a long time, if not for their whole life. It undoubtedly accords with the reasonable expectations of the respective parties that their existing personal law is determinative. By applying the ante-nuptial domicile of both parties the dual domicile theory adopts an even-handed approach to the sexes, in contrast with the intended matrimonial home formulation, set out below. The adoption of any other test would enable the parties to evade the restrictions imposed by their ante-nuptial domiciliary law.[29] The dual domicile theory has the approval of the English Law Commission who stated:

> The main rationale of the dual domicile rule is that a person's status is a matter of public concern to the country to which he belongs at the time of marriage; and therefore

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26. *See generally In re* Paine, 1 Ch. 46 (Ch. 1939); Pugh v. Pugh, [1951] P. 482 (Eng. C.A.); R v. Brentwood, 2 Q.B. 956; Padolecchia v. Padolecchia, [1968] P. 314 (Eng. C.A.); Szechter v. Szechter, 1971 P. 286 (Eng. C.A.). *See* Marriage (Enabling) Act 1960 § 1 (3); Matrimonial Causes Act 1973 § 11 (d) (two statutory provisions also supporting a dual domicile perspective). Many of the earlier decisions did not provide conclusive support for either test. *See generally,* Brook, 9 H.L.C. 193; *In re* De Wilton, 2 Ch. 481 (1900).

27. *See* L.C.W.P. No. 89 (1985) at para. 3.36 (b); Hartley (1972) 35 M.L.R. 571, at 576; and North, *Reform, but not Revolution. General Course on Private International Law*, vol. I 220 *Recueil Des Cours* (1990), 9 at 54.

28. *See* MCCLEAN, *supra* note 16, at 153.

29. *See* CLARKSON AND HILL, *supra* note 16, at 308.

> the domiciliary law of each party has an equal right to be heard. The issue of whether a valid marriage has been or may be contracted should, in principle and in logic, depend on the conditions existing at the time of marriage rather than subsequently.[30]

The rigid dual domicile approach, however, suffers from a number of substantial disadvantages. The cumulative nature of the test, looking at both parties' ante-nuptial domiciliary laws, greatly increases the likelihood of the marriage being declared invalid, than if a single determinative law were applied.[31] This runs counter to the policy objective of presuming in favor of upholding the validity of a marriage, described in the introductory section. Additionally, the theory is open to criticism in that it fails to consider the focal point of the marriage, the law to which the marriage belongs, the matrimonial residence of the parties. It is this community where the incidents of the relationship will have their impact.[32] Difficulties also result from the idiosyncratic nature of the English concept of domicile.[33] As the Law Commission admitted, the establishment of domicile has "become overloaded with technical and complex rules."[34] It may even be the case that, through the revival of a domicile of origin, an individual could be domiciled in a country which he has never visited and with which he has no current connection.[35] This is hardly a rational solution to apply the law of that country to govern capacity to marry. Anti-evasion is also a possibility in that it may be feasible for a person to acquire a new domicile of choice prior to the marriage; recent English judicial developments have relaxed the

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30. L.C.W.P. No. 89 (1985), at para. 3.36.

31. *See* Hartley, *supra* note 5, at 578.

32. *See* Smart, *supra* note 14, at 228-29.

33. *See generally* J.J. Fawcett, *Result Selection in Domicile Cases,* 5 OXFORD J. LEGAL STUD. 378 (1985); P.B. Carter, *Domicil: The Case for Radical Reform in the United Kingdom,* 36 INT'L & COMP. L.Q. 713 (1987); Blaikie, "The Domicile of Dependent Children: A Necessary Unity" [1984] Jur. Rev. 1; J.A. Wade, *Domicile: A Re-Examination of Certain Rules,* 32 INT'L & COMP. L.Q. 885 (1984); M.P. Pilkington, *Illegal Residence and the Acquisition of a Domicile of Choice,* 33 INT'L & COMP. L.Q. 885 (1984); Richard Fentiman, *Domicile Revisited,* 50 CAMBRIDGE L.J. 445 (1991).

34. L.C.W.P. No. 89 (1985) at para. 3.28.

35. *See generally* Udny v. Udny LR1 Sc & Div. 441 (1869); Tee v. Tee, 3 All ER 1105 (C.A. 1973).

restrictive *animus*[36] requirement for acquisition of a new domicile of choice. Dual domicile theory, as a rigid jurisdiction-selection test, also suffers from the fault of failing to evaluate the particular issue raised when the question of essential validity is in dispute. A palliative cure, adopting an issue-sensitive approach, is the focus of the article.

2. The Intended Matrimonial Home Theory

The main alternative theory is that the parties' capacity to marry is determined by the law of their intended matrimonial home (sometimes called the matrimonial domicile).[37] This test, associated in England with Dr Cheshire, and with the principal early proponents in the United States being Cook[38] and Taintor,[39] can be more fully stated as follows:

> The basic presumption is that capacity to marry is governed by the law of the husband's domicil at the time of the marriage, for normally it is in the country of that domicil that the parties intend to establish their permanent home. This presumption, however, is rebutted if it can be inferred that the parties at the time of the marriage intended to establish their home in a certain country and that they did in fact establish it there within a reasonable time.[40]

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36. *See* Re Furse, 3 All ER 838 (Ch. 1980); Brown v. Brown, 3 Fam. 212 (1981); and Plummer v. Inland Revenue Commissioners 1 All ER 97 (Ch. 1988) (evidencing a more rational shift towards the application of a real and substantial connection test as the measure of domiciliary intent). *See* Winans v. Attorney Gen. [1904] A.C. 287 (H.L.); Ramsay v. Liverpool Royal Infirmary [1930] A.C. 588 (providing a more restrictive permanent home test).

37. There is not inconsiderable support for the intended matrimonial home test. *See* De Reneville v. De Reneville [1948] P. 100, 114, 121-122 (but these statements were made obiter as the question of capacity to marry was not directly in issue). *See generally* Kenward, 1950 All E.R. 297; Bliersbach v. McEven [1959] S.L.T. 81 (1st Div.); Radwan v. Radwan (No. 2), [1973] Fam. 35.

38. *See* WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS, 448 (1942).

39. *See* Charles W. Taintor, *Marriage in the Conflict of Laws*, 9 VAND. L. REV. 607 (1956); Charles W. Taintor, *What Law Governs the Ceremony, Incidents and Status of Marriage*, 19 BUL REV. 353 (1939).

40. G.C. CHESHIRE, PRIVATE INTERNATIONAL LAW 277-78 (7th ed. 1965).

The male-orientated presumption in Cheshire's test, pointing to the law of the husband's domicile on the premise that the parties will make their permanent home in his country, is totally out of touch with modern etymologies of gender equality. It may or may not have been true over fifty years ago, but in any event through the abolition of the married woman's domicile of dependence, this perspective is no longer cogent.[41] A better rationale of the intended matrimonial home test today is that it displaces dual domicile theory in cases where the parties intend to and actually establish a matrimonial home within a reasonable time frame. The central tenet of this theory is that the state in which the parties establish their matrimonial home has a greater interest in that marriage than the state to which the parties belonged before the marriage.

The great advantage of adopting the intended matrimonial home doctrine is that it allows the validity of a marriage to be tested by the community of the country most affected by, and involved with, the parties' marital status. Presumptively, it is socially undesirable that a marriage which is not regarded as detrimental to the community to which the parties belong after the marriage, for example a marriage between first cousins, should be pronounced void, merely because one or other or both of the parties were formerly connected with a country in which a different view prevails. The "true seat" of the marriage, the proper law, is the actual matrimonial residence itself.[42] A connected matter here is to give effect to the objective of upholding the reasonable expectations of the parties, to uphold the validity of a marriage, good in the community where the parties have resided for a significant period, rather than invoke a impediment under pre-nuptial domiciliary law.[43]

A prime example of the doctrine being invoked in a hard case to promote party expectation was *Radwan v. Radwan (No. 2)*,[44] where the intended matrimonial home test enabled the court to uphold the validity of a polygamous marriage after the parties had lived together as man and wife for nearly twenty years and had eight children. The other significant advantage of the theory is that, unlike the rival dual domicile approach, it

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41. L.C.W.P. No. 89 (1985) at para. 3.34; A.J.E. Jaffey, *The Essential Validity of Marriage In the English Conflict of Laws*, 39 MOD. L. REV. 41 (1978).

42. Report of the Royal Commission on Marriage and Divorce (1956) Cmnd. 9678, para. 889; Bliersbach, [1959] S.L.T. at 89.

43. *See* P.A. Stone, *Capacity for Polygamy—Judicial Rectification of Legislative Error*, 13 FAM. LAW 76, 78-80 (1983).

44. *See generally* Radwan, [1973] Fam. 35.

promotes the validity of marriages. It favors marital validity in that the test ensures that only one law governs the question of capacity to marry, thus, it reduces by half the opportunity for an invalidating impediment striking down the union.

There are, however, a number of significant criticisms that may be raised against the rigid jurisdiction-selection rule of an intended matrimonial home test to govern all nature of essential validity issues.[45] The test is inherently uncertain, which causes significant difficulties for marriage officials engaged in addressing the initial validity of the marriage. The doctrine is inoperable prospectively and only operates in a retrospective sphere. It seems that, self-evidently, the test requires the necessity of waiting for some time to see if and where the matrimonial home is established.[46] During this moratorium the validity of the marriage cannot properly be decided and, *perforce*, must be held in suspended abeyance: this is a regrettable vacuum given that property devolution may depend upon the validity of the "in limbo marriage." This point has been cogently stressed by a number of leading commentators,[47] who have also noted that it is possible in some cases that no matrimonial home at all may be established:

> Very serious practical difficulties are likely to arise if the validity of a marriage has to remain in suspense while we wait and see (for an unspecified period) whether or not the parties implement their (unexpressed) ante-nuptial intention to acquire another domicile. This is especially true if interests in property depend on the validity of a marriage, as, for instance, where a widow's pension ceases on her remarriage.[48]

It may well be fallacious to universally assume that it is the law of the intended matrimonial home that has the greatest interest in the marriage. A number of impediments to marriage are designed to protect the individual person, for example, the age requirement under English law that no marriage

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45. *See* Smart, *supra* note 14, at 228-229.

46. L.C.W.P. No. 89 (1985) at para. 334; *see generally* H. Patrick Glenn, *Capacity to Marry in the Conflict of Laws: Some Variations on a Theme*, 4 DALHOUSIE L.J. 157 (1977).

47. *See* NORTH AND FAWCETT, *supra* note 2, at 589; MCCLEAN, *supra* note 16, at 6, 154; Smart, *supra* note 14, at 228; Hartley, *supra* note 5, at 2; Jaffey, *supra* note 41, at 11; Fentiman, *supra* note 14, at 5; CLARKSON AND HILL, *supra* note 16, at 311.

48. MCCLEAN, *supra* note 16, at 154.

may be contracted until the age of sixteen. The purpose of this prohibition is to protect against immaturity and demonstrates an imbued paternal state interest in the welfare of its own domiciliaries. This interest is of an enduring nature and the purpose will be defeated if the marriage of a girl under age by her English domiciliary law were to be held valid, and this is so irrespective of whether the minor settles in a union abroad.[49] It is arguable that the intended matrimonial home test opens the door to evasion of the capacity rules of the pre-nuptial domiciliary laws of the respective parties, and which have a legitimate concern in their status and in the application of their rules as to capacity.[50]

The test may, on occasion, negate effecting the reasonable expectations of the parties and promulgation of marital validity.[51] A significant migratory trend over the course of the last few decades has been movement of people from developing into developed countries, and from states permitting polygamy to those adopting the practice of monogamous marriages, declaring polygamous unions to be void.[52] The trends similarly reveal movement of people from countries where the age at which the parties can lawfully marry is fourteen for boys and twelve for girls, to higher age group limits such as sixteen in England. The impact of applying intended matrimonial home theory to these individuals, who emigrate to England, may be to invalidate a marriage which is valid by the law of the domicile of both parties at the time of marriage, consequently abrogating the parties' reasonable expectations.[53] In the light of such excoriating criticisms it seems apparent that the test is unsuitable as a universal choice of law doctrine to all issues of essential validity. However, it does have a role to play as an

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49. The cogency of this paternal interest was manifested by the public outcry in England in a marriage effected by a 13-year-old domiciliary abroad. In this cause celebre, the girl went through a marriage ceremony in Turkey with a 19-year-old Turkish domiciliary, and set up home therein, before her eventual return to England on the failure of the adolescent relationship. *See* Michael Horsnell, *Waiter is charged with rape of schoolgirl bride*, LON. TIMES, January 24, 1996, at p.1.

50. *See* Smart, *supra* note 45, at 228.

51. *See* CLARKSON AND HILL, *supra* note 16, at 312.

52. *U.N. Demographic Yearbook* 1989 (4 lot issue, 1991) at 553, 598; European Communities Statistical Office, *Migration Statistics* (1994) at 58-59.

53. In a number of South American countries (Columbia, Ecuador, Paraguay, Chile, and Panama), the age of lawful marriage is 12 for girls and 14 for boys. *See* UN Demographic Yearbook 1993 (45th issue, 1995)) at 546-556. *See generally* I.G.F. Karsten, *Capacity to Contract a Polygamous Marriage*, 36 MOD. L. REV. 291 (1973); Davie, *supra* note 12, at 35.

appropriate doctrine to selective issues of capacity, and these legitimate interests are subsequently explored.[54]

3. The Real And Substantial Connection Theory

This third approach has derived out of the proper law test in contract, and the English common law test for foreign divorce recognition established in *Indyka v Indyka*,[55] with the ideal to connect the marital union with the community to which it empathetically belongs.[56] The proper law of the marriage is demarcated as being the system of law that has the most real and substantial connection with the marriage. This will often correlate to the state where the matrimonial home is situated, but not necessarily so, as the inherent flexibility of the test allows consideration of a multiplicity of relevant factors embracing domicile, nationality, residence, intention, and place of contracting. The test is viewed as sociologically desirable in looking to where the couple actually conduct their married life to rule on validity. Sykes first propounded the idea in 1955.[57] It lay dormant collecting dust on library shelves for a number of decades but then was revived in the choice of law arena by English courts during the course of the 1980's,[58] as well as through support from academic commentators.[59]

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54. Discussed further below in the context of polygamy, consanguinity, and divorce regulation.

55. Indyka v. Indyka, 1 A.C. 33 (H.L. 1969).

56. The test for divorce recognition was abandoned in the Recognition of Divorces and Legal Separations Act of 1971 and for nullity recognition by the Family Law Act of 1986. Morris derided the test in the following term. "[T]he effect ... has been to leave the law in a state of grave uncertainty on a matter where certainty is most desirable ... [T]here has been a spate of cases on the recognition of foreign divorces; the courts have been left to grope their way as best they can through the uncertainties of what constitutes a real and substantial connection; and large numbers of people simply do not know whether or not they are married, and if so, to whom." MORRIS, CONFLICT OF LAWS (1st ed. 1971). *See generally* P.R.H. Webb, *The Old Order Changeth-Travers v. Holley Reinterpreted*, 16 INT'L & COMP. L.Q. 997 (1967).

57. *See* Edward I. Sykes, *The Essential Validity of Marriage*, 4 INT'L & COMP. L.Q. 159, 165 (1955). The proposal was that capacity should be governed by the proper law of the contract to marry. In essence, the law applicable was determinable as the law of that country with which the contract had the most real connection.

58. Vervaeke v. Smith [1983] A.C. 145, 166 (H.L. 1982); Lawrence v. Lawrence [1985] Fam 106, 115.

59. *See generally* Fentiman, *supra* note 14 CAMBRIDGE L.J.; Smart, supra note 14; *see* Fentiman, *supra* note 14 OXFORD J. LEGAL STUD.

The revival of interest in the test can be attributed to its consideration by Lord Simon (obiter) in the House of Lords in *Vervaeke v. Smith*,[60] a notorious case enshrined as the Belgian prostitute affair. At issue was a pernicious marriage of convenience, contracted in England, between an English domiciliary and a Belgian prostitute, and effected purely to allow her to become resident in England and to acquire British nationality. It was obviously not intended that any matrimonial home would ever be established. In accordance with Belgian law, that of the petitioner's domicile, the marriage was a sham and thus void, whereas by English law the marriage, though a sham was nonetheless valid.[61] According to Lord Simon the key issue was whether a marriage had transpired, what he called "quintessential validity." Resolution of this question would be by the application of "the law of the territory with which the marriage has the most real and substantial connection."[62] This test was subsequently judicially applied to the issue of remarriage after a foreign divorce[63] and to capacity to enter a polygamous marriage.[64]

This proper law test has drawn support on the basis of its flexibility and because it provides a sound policy-orientated solution to ameliorate the difficult cases under orthodox doctrine where the parties have separate domiciles and no matrimonial home.[65] It is submitted, however, that a test denounced as unworkable for divorce recognition,[66] and discredited therein, should like Phoenix from the flames, be revived in the sphere of essential validity. It suffers from an imbued lack of certainty,[67] a vital missing quality in light of the significance of the marriage institution to the personal status of the parties. As with the "most significant relationship" test of the American Restatement Second of the Conflict of Laws, derided by Cavers,

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60. Vervaeke, [1983] A.C. at 165.

61. The appellant had married for a second time in Italy, but unfortunately her "husband" died at the reception that very evening. The appellant wished to inherit his property as a "wife," but an obvious obstacle to this was the validity of her earlier marriage.

62. Vervaeke, [1983] A.C. at 165. The primary connection was to the *lex fori*, i.e., to England.

63. *See generally* Lawrence, [1985] Fam. 106.

64. Entry Clearance Officer, Dhaka v. Ranu Begum [1986] Imm. A.R. 460.

65. *See supra* note 58. Fentiman has submitted that the approach is sociologically desirable because, "it is best for the law of the place where a couple lead their married life to decide whether or not they are legally married." *See* Fentiman, *supra* note 14 CAMBRIDGE L.J., at 277; Fentiman, *supra* note 14 OXFORD J. LEGAL STUD., at 360.

66. *See supra* note 56.

67. *See* Davie, *supra* note 12, at 37.

amongst others, it is tainted by the cryptic and question-begging nature of the supposed test,[68] allowing an undue extent of judicial *ad hoc* justice dressed up as predicated on sound policy. The question of marital validity is not conclusively answered, but rather the real and substantial connection test "simply restates the problem."[69] The uncertainty argument is cogent, as it is possible for a real and substantial connection to point to more than one jurisdiction, consequently obfuscating the appropriate law.[70] The English Law Commission has succinctly identified the demerits of the approach:

> It is an inherently vague and unpredictable test which would introduce an unacceptable degree of uncertainty into the law. It is a test which is difficult to apply other than through the courtroom process and it is therefore unsuitable in an area where the law's function is essentially prospective, i.e., a yardstick for future planning.[71]

4. Alternative Reference Theory and Exceptions to Orthodox Doctrine

It has been propounded that another viable test is a rule of alternative reference for the purpose of validating a marriage: the marriage should be held valid if it is valid under either the dual domicile test or the intended matrimonial home test.[72] Although such a choice of law rule would, of course, result in more marriages being upheld, it was nonetheless rejected by the Law Commission on the premise that it was wrong to elevate the general policy in favor of upholding the validity of marriages into a governing rule.[73] It is submitted such a test is devoid of merit and would result in an abdication of the sensitive policy search for rational and structured choice of law principles. It would be contrary to principle to adopt the dual domicile (or

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68. *See* DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS 67 (1985).

69. *See* Davie, *supra* note 12, at 37.

70. PETER M. NORTH, PRIVATE INTERNATIONAL LAW PROBLEMS IN COMMON LAW JURISDICTIONS 36 (1993).

71. L.C.W.P. No. 89 (1985), para. 3-20. *See generally* North, *Reform, but not Revolution. General Course on Private International Law*, vol. I. 220 *Recueil Des Cours* (1990), 9 at 66-67.

72. *See generally* Jaffey, *supra* note 41.; (1982) 2 OXFORD J. LEGAL STUD. 868; and *see also* Royal Commission on Marriage and Divorce (1956), Cmnd. 9678, para. 891.

73. L..C.W.P. No. 89 (1985), at para. 3.37.

the intended matrimonial home) test and then to refuse to give effect to it if it results in the invalidity of the marriage.[74]

A further proposal which has been put forward,[75] that a marriage should be regarded as essentially valid if it is valid by the law of the domicile of either party at the time of the marriage, is subject to the same criticisms as the alternative reference test. It comports to a rigid jurisdiction-selection rule, attempting to buttress marital validity, but with no exploration of selective choice of law issues relating to capacity. The Law Commission has resiled from this approach in clear terms:

> If it is accepted that a person's status is a matter of public concern to the country in which he or she is domiciled at the time of marriage, then the rules of that country which are designed to protect its public interest (such as rules laying down prohibited degrees of relationship or requiring monogamy) should be given effect. The proposed rule would enable a party to evade the requirements of his domiciliary law and would also lead to limping relationships.[76]

Although alternative reference tests have been rejected in English law, a number of exceptions have developed to the primacy of the orthodox dual domicile test. The emergence of these exceptions, which tend to promulgate the explicit policy objectives of the *lex fori*, mirror the overthrow of the general application in the United States of a *lex loci delicti* rule in tort which occurred by judicial sleight of hand through selective use of characterization,[77] *renvoi*,[78] and public policy.[79] A significant exception was

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74. *See* North, *supra* note 70, at 33.

75. *See* Hartley, *supra* note 5, at 576-78.

76. L.C.W.P. No. 89 (1985), at para. 3.38. The rejection of alternative reference tests has left remaining the two orthodox theories of dual domicile and intended matrimonial home. Exceptions may rarely apply on public policy grounds to retreat from the entrenched position. *See* Scott v. Her Majesty's Attorney Gen. 11 PD 128 (P. 1886) (prohibition on remarriage); Gray v. Formosa [1953] P 259 (inability to marry other than in accordance with the tenets of a particular faith); and Chetti v. Chetti [1909] P. 67 (incapacity to marry outside one's caste.) This public policy discretion is to be sparingly exercised. *See* Cheni v. Cheni, 3 All E.R. 873, 879 (P. 1962).

77. *See* Levy v. Daniels' U-Drive Auto Renting Co., 143 A.2d 163 (Conn. 1928).

78. *See* Richards v. United States, 369 U.S. 1 (1962).

79. *See* Kilberg v. Northeast Airlines, 172 N.E.2d 526, 528 (N.Y. 1961).

created by the ruling in *Sottomayer v De Barros (No. 2)*[80] which determined that if a marriage is celebrated in England between parties one of whom has an English and the other a foreign domicile, an incapacity imposed by the foreign law but not by English law must be totally disregarded. This means that effect will not be given to the foreign domiciliary law unless English law also prohibits the marriage or unless the marriage is celebrated outside England. In *Sottomayer*, the English court upheld the validity of a marriage celebrated in England between first cousins, one of whom was domiciled in England and the other in Portugal, despite the fact that at the time the law of Portugal prohibited marriage between first cousins. The foreign incapacity was ignored to promote policy objectives of the *lex fori* and to prevent injustice to English domiciliaries because, "no country is bound to recognize the laws of a foreign State when they work injustice to its own subjects."[81]

Another exception has developed on pragmatic grounds to deal with the incidental question whether priority is given to divorce recognition or marital capacity provisions. Under section 50 of the Family Law Act of 1986 where a divorce or annulment has been granted by an English court, or is recognized in England, it is treated as irrelevant that the divorce or annulment may not be recognized elsewhere. The divorce or annulment shall not prevent either party to the marriage from remarrying in England or cause the remarriage of either party (irrespective of where the remarriage occurs) to be denied invalidity in England. In effect, a marriage will be valid in England despite the fact that under a party's domiciliary law the parties lacked capacity to marry since their personal law refused to acknowledge a divorce decree terminating the first marital union.[82]

As a final point, it seems that where the marriage is celebrated in England both parties must have capacity under English law to enter into the union.[83] A marriage is likely to be held invalid in such a situation even through the parties may have capacity under their domiciliary laws: "[O]ur

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80. *See* Sottomayer v. DeBarros, 5 P.D. 94 (P. 1879).

81. *See id.* at 104. This rule applies to individuals domiciled in England who may not be British subjects.

82. *See* discussion *infra* pp. 40-47.

83. *See* Breen v. Breen [1964] P. 144. *See* Reed v. Reed, [1969] 6 D.L.R. 617 (Can.) (for contrasting Canadian decision where the court declined to apply the law of the place of celebration to the issue of capacity.) *See generally* David Bradshaw, *Capacity to Marry and the Relevance of the Lex Loci Celebrationis in Commonwealth Law: A Conundrum Worthy of a Dr. John Morris Seminar,* 15 ANGLO-AM. L. REV. 112 (1986); C.M.V. Clarkson, *Marriage in England: Favouring the Lex Fori*, 10 LEGAL STUD. 80 (1990).

courts can hardly be expected to uphold the validity of marriages which their own law does not countenance."[84]

B. The United States

The division by English law into compartments of formal and essential validity that occurred during the nineteenth century[85] marked a pronounced schism in Anglo-American common law application. The rigid approach in the United States, at least prior to the impact of interest analysis theory and the proper choice of law uprising, has been a general reference rule to the law of the place of celebration to all matters of marital validity.[86] As Professor North has commented, efforts to combat evasion of mandatory provisions, via the mechanism of the Uniform Marriage Act of 1912 and similar legislation, proved largely nugatory in limiting the over-reaching scope of the place of celebration rule.[87] The only exceptions to such a broad governing test developed embryonically through the public policy strictures applied qua *lex fori*. In any event, as considered below, the great interest analysis tornado in the United States that revolutionized choice of law application in the fields of tort and contract, has swept past family law matters leaving them relatively unscathed. The common law perspective in the United States was succinctly stated by Chief Justice Winslow in *Lanham v. Lanham*:

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84. L.C.W.P. No. 89 (1985), at para. 3-42.

85. In 1861, the House of Lords drew a distinction between formal and essential validity. The parties were English domiciliaries, and the wife was the sister of the husband's deceased first wife. The marriage was celebrated in Denmark during a temporary visit to that country. It was valid by Danish law but prohibited under English affinity rules. Place of celebration was treated as determinative for formal validity but no longer ruled essential validity according to the House of Lords. Lord Campbell opined, "But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the marriage depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated." Brook v. Brook, 9 H.L.C. at 207.

86. *See* North, *supra* note 70, at 25. *See generally* Reifschneider v. Reifschneider 89 N.E. 255 (Ill. 1909); *In re* Lando's Estate, 127 N.W. 1125 (Minn. 1910); Boysen v. Boysen 23 N.E.2d 231 (Ill. App. Ct. 1939), Great Northern R R.. Co. v. Johnson, 254 F. 683, (1918) (upholding a marriage contracted by correspondence); Hardin v. Davis, 16 Ohio. Supp. 19 (1945) (upholding a proxy marriage).

87. *See id.;* North, *supra* note 8, at 22; EUGENE F. SCOLES AND PETER HAY, CONFLICT OF LAWS 437 (1982).

> The general rule of law unquestionably is that a marriage valid where it is celebrated is valid everywhere. To this rule, however, there are two general exceptions which are equally well-recognised, namely: (1) Marriages which are deemed contrary to the law of nature as generally recognised by Christian civilized states, and (2) marriages which the lawmaking powers of the forum has declared shall not be allowed validity on the grounds of public policy.[88]

State courts in the United States have demonstrated a degree of genuflection in striking down unions on the premise that they offend the public policy sensibilities of the forum.[89] Polygamous and incestuous marriages, which offend imbued state welfare concerns, have been denied recognition.[90] There is, however, a prevailing uncertainty over the types of union to be stigmatized as constituting an incestuous relationship.[91] Unions between ascendant and descendent, or between brother and sister, clearly fall into this category, but vacillating decisions exist in relation to consanguinous unions between aunt and nephew, uncle and niece, and to a lesser degree, between first cousins.[92] There is also a lack of universal treatment to marriage of individuals within a certain prescribed age limit without parental consent, or consent of the appropriate guardian.[93] Difficulties also exist in

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88. *See* 117 N.W. 787, 788 (1908). In effect, exceptions (1) and (2) are public policy strictures on marriage that are applied qua *lex fori.*

89. *See* ROBERT F. LEFLAR, AMERICAN CONFLICTS LAW 531 (1968); EHRENZWEIG, *supra* note 6, at 376-86; Joseph H. Beale, et al., *Marriage and the Domicil*, 44 HARV. L. REV. 501, 506 (1931).

90. *See generally* Earle v. Earle, 126 N.Y.S. 317 (N.Y. App. Div. 1910); *In re* Miller's Estate, 214 N.W. 428 (Mich. 1927).

91. *See* Maddaugh, *supra* note 4, at 123-28.

92. *See generally* Stevenson v. Gray, 56 Ky. 193 (1856); *In re* May's Estate, 114 N.E.2d. 4 (1953); (providing examples of unions between uncles and nieces that were upheld). *See generally* Catalano v. Catalano, 170 A.2d 726 (Conn. 1961); State v. Brown, 23 N.E. 747 (Ohio 1890) (providing examples of unions between uncles and nieces that were denied validity). *See generally* Osoinach v. Watkins, 180 So. 577 (Ala. 1938) (marriage between an aunt and nephew was similarly denied). *See generally* Weinberg v. Weinberg, 242 Ill. App. 414 (1926); Martin v. Martin, 46 S.E. 120 (W.Va. 1903) (first cousin marriages were denied). *See generally In re* Miller's Estate, 214 N.W. 428; Leefield v. Leefield, 66 P. 953 (Pa. 1917) (first cousin marriages upheld). *See infra.* pp. 48-55 (for fuller discussion on the policy issues underlying these consanguinous relationships, and optimal choice of law).

93. *See generally* McDonald v. McDonald, 58 P.2d. 163 (Cal. 1953); State v. Graves, 307 S.W.2d 545 (Ark. 1957) (adopting a place of celebration test). *See generally* Ross v. Bryant, 217 P. 364 (Okla. 1920); Wilkins v. Zelichowski, 140 A.2d 65 (N.J. 1958); Sirois v. Sirois,

treatment of penal state legislation with delimiting provisions affecting the ability of parties to a divorce to remarry during the lifetime of the other spouse,[94] or prohibiting either spouse from remarrying within a specified time after the divorce.[95]

Of extreme significance in surveying the landscape picture of United States perspectives on marital validity is the impact of the American Law Institute's Restatement of the Law of Conflict of Laws. The Restatement First, for which Joseph Beale acted as Reporter, and which appeared in 1934, provides a broad affirmation and endorsement of the common law approach that has been previously enunciated.[96] Section 121 provides that, "...a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with."[97] Exceptions to this governing rule are laid down in section 132 and consist of the following matters: polygamous marriage, incestuous marriage of a degree that offends a strong policy of the domicile, and a marriage of a domiciliary that the domicile has made void by statute even though celebrated in another state.[98] The triumvirate of presumptions is completed by the terms of section 122: "A marriage is invalid everywhere if any mandatory requirements of the marriage law of the state in which the marriage is celebrated is not complied with."[99]

In the 37 years between the First and Second Restatement, there was a well-documented fundamental revolution in the development of applicable choice of law principles in the United States. Before assessing the marked change of approach between the two Restatements in relation to marital validity, it is instructive briefly to chart the altered general orthodoxy of choice of law theoretical underpinnings. The place of celebration as a general reference test represents a rigid jurisdiction-selection rule. In similar vein is the English theory of dual domicile as a broad test for all matters of

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50 A.2d 88 (N.H. 1946) (applying common domiciliary state law or public policy).

94. *See generally* State v. Shattuck, 38 A. 81 (Vt. 1897); Commonwealth v. Lane, 113 Mass. 458 (1873); Pennegar v. State, 10 S.W. 305 (Tenn. 1889); Wheelock v. Wheelock, 159 A. 665 (Vt. 1931).

95. *See generally* Horton v. Horton, 198 P. 1105 (Ariz. 1921); Harvey v. State, 238 P. 862 (Okla. 1925); Dudley v. Dudley, 130 N.W. 785 (Iowa 1911); Wright v. Wright, 162 N.E. 894 (Mass. 1928); Peters v. Peters, 276 P.2d 302 (Kan. 1954). *See infra* note 76 (for discussion under English law).

96. *See* Maddaugh, *supra* note 4, at 126.

97. *See id.*

98. *See id.*

99. *See id.*

essential validity.[100] By jurisdiction-selection what is meant is that, "they require the court to apply the law of the country chosen by the private international law rule irrespective of the content of the substantive rule of law thereby selected."[101] In contrast stands the process of rule-selection technique promulgated in the intervening thirty-seven-year period between the Restatements by leading United States commentators and developed by the creativity of the judiciary. By this method emphasis is squarely placed on a balancing exercise addressing the countervailing interests in the application of a particular substantive rule of one legal system rather than a quite different rule established by another legal system.[102] The rule-selecting approach, thus, requires the court to identify the particular issue and the legal systems whose rules might be regarded as interested. This involves an examination of the purposes and policies underlying the individual rules and also of the interests of the states whose rules are in issue.[103]

A false conflict occurs where only one state has an interest in having its law applied, and consequently that will be the law adopted. In cases where both states have an interest in their law being adopted, known as a true conflict, then it is essential for the court to weigh the strengths of the respective competing interests.[104] There is a lack of agreement amongst the "revolutionaries" in the United States as to how this selection is to be effected, and various rule-selection techniques have been propounded. Currie would apply the law of the forum, looking to government interest analysis and the *lex fori*.[105] Baxter adopted comparative impairment that

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100. *See* David F. Cavers, *Contemporary Conflicts Law in Amercian Perspective, in* III COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 75, 103 (1970) (referring to them as state-selecting).

101. *See* NORTH, *supra* note 5, at 111.

102. *See id.*

103. *See generally* Fawcett, *supra* note 13.

104. *See* Brainerd Currie, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1233, 1242-43 (1963); RUSSELL WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS, 291-92 (1971); *see also* Cavers, *supra* note 98, at 100-102.

105. *See generally* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963). Currie's theory was vividly exemplified by Cavers in his general course of lectures given at the Hague Academy in 1970:

> A court asked to apply the law of a foreign state different from the law of the forum should:
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> > (1) Inquire into 'the policies expressed in the respective laws' and the circumstances that may render reasonable the application of those policies, employing 'the ordinary processes of

necessitates the court ascertaining which of the conflicting state's interests would be more impaired if its policy were to be subjugated to the policy of the other state.[106] Cavers' approach would involve the court in working out principles of preference, meaning in essence, detailed choice of law rules for "true conflict" situations.[107]

Whilst the jurisdiction-selection technique is rigid and certain in application, the rule-selection process is inherently flexible. The interest

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> construction and interpretation'.
> (2) If only one State has an interest in the application of its policy, apply the law of that State.
> (3) If the two States' interests appear in conflict, consider whether 'a moderate and restrained interpretation of one policy or interest of one state or the other may avoid conflict'.
> (4) If a conflict between the States' 'legitimate interests' persists, apply the forum's law.

See Cavers, *supra* note 98, at 146-47. *See* Bernhard v. Harrah's Club, 546 P.2d 719, 722 (Cal. 1976) (the paradigm case adopting governmental interest analysis and the *lex fori*). The doctrine has been criticized on bases of uncertainty and difficulties intrinsic to the determination of competing governmental interests and the balance between them. *See* AMOS SHAPIRA, THE INTEREST APPROACH TO CHOICE OF LAW 221-24 (1970); *see generally* Gerhard Kegel, *Paternal Home and Dream Home: Traditional Conflicts of Laws and the American Reformers*, 27 AM. J. COMP. L. 615 (1979); *see generally* DAVID C. JACKSON, THE "CONFLICTS" PROCESS (1975).

106. *See generally* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963). This approach is not willing to apply the *lex fori* control of true conflicts. *See generally* Offshore Rental Co. Inc. v. Cont'l Oil, 583 P.2d 721 (Cal. 1978); Hall v. Univ. of Nevada, 141 Cal. Rptr. 439, 440 (Cal. Ct. App. 1977); Cable v. Sahara Tahoe Corp., 155 Cal. Rptr. 770, 773 (Cal. Ct. App. 1979) (for illustration of application). Horowitz extended Baxter's general proposition so that the law applied to true conflicts would be the state law that had the most intense interest in relation to the particular dispute. *See* Horowitz, *The Law of Choice in California—A Restatement*, 21 UCLA L. REV. 719, 755 (1974). *But see* Russell J. Weintraub, *The Future of Choice of Law For Torts: What Principles Should Be Preferred?*, 41 LAW & CONTEMP. PROBS. 146, 158 (1977). Comparative impairment, "unless supplemented by specific objective criteria, is unlikely to be a method that is cogent, feasible to administer, and predictable." *Id.*

107. *See generally* Cavers, *supra* note 98; Cavers, *supra* note 102. The primary aim is to do justice between the interested parties, and from these equitable principles, it is anticipated more structured rules will develop as a consequence of judicial activity. *See* North, *supra* note 5, at 122. *See generally* Neumeir v. Kuehner, 286 N.E.2d 454 (1972) (for formulation of these principles). *See* Shapira, *supra* note 103, at 221-24 (for criticism on the bases of ignoring the importance of forum law, territorialist bias, and lack of appreciation for private interests). *See* Ehrenzweig, *supra* note 6, at 311; Albert A. Ehrenzweig, *The Lex-Fori-Basic Rule in the Conflicts of Laws*, 58 MICH. L. REV. 637, 643-45 (1960) (in relation to interpretation of forum policy).

analysis approach, developed in the United States for tort and contract disputes, has become affiliated with rule-skepticism whereby general choice of law rules are disregarded in favor of a case by case judicial investigation of the respective competing state interests. Professor Cavers has vividly exemplified the question of choosing between a jurisdiction-selection or rule-selection approach. "[S]hould a court in dealing with a claim that a foreign law is applicable to the case before it or to an issue in that case choose between its own and the foreign legal system or, instead, choose between its own rule and the foreign rule?"[108] The United States's answer is to come down firmly in favor of rule-selection.

The Restatement Second of 1971 reflected the considerable interest analysis revolution that infected United States choice of law principles during the intervening period.[109] It adopted as the primary test for choice of law the law of the state that has the most significant relationship to the particular issue. The identity of the state of most significant relationship is left very much open for debate, but in section 6, the court is directed to consider the following disparate considerations:

> (1.) A court, subject to constitutional restrictions will follow a statutory directive of its own state on choice of law.
> (2.) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:
>
> A. the needs of the interstate and international systems,
> B. the relevant policies of the forum,
> C. the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> D. the protection of justified expectations,
> E. the basic policies underlying the particular field of law,
> F. certainty, predictability and uniformity of result, and
> G. ease in the determination and application of the law to be applied.

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108. *See* Cavers, *supra* note 98, at 122.

109. *See* North, *supra* note 5, at 125.

The most significant relationship test, with a number of underlying factors impacting upon choice, is applied in the Restatement to a whole host of conflicts issues. The test is associated with Willis Reese, and in his terms, is a specific issue-centered approach.[110] By section 283 of the Restatement marital validity is determinable as follows:

> (1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage.
> (2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which has the most significant relationship to the spouses and the marriage at the time of the marriage.

The marked difference between the First and Second Restatements is that the latter, by section 283, acknowledges that the place of celebration may not have the greatest interest in the evaluation of either matters of formal or essential validity of a given marriage. It eschews a ritualistic jurisdiction-selection test of place of celebration. One is ultimately left, however, with the feeling that the conflicts upheaval in the United States has virtually bypassed the area of marital validity. Although main family law issues are covered in the Restatement Second, they are treated as insignificant compared to choice of law for obligations. Tort and contract require thirty-six and twenty-eight sections of coverage respectively, whereas matters affecting status are only allocated eight sections in total.[111] This has led Professor Baade to assert that, "I could not help feeling that I was dealing with a stepchild. Professor Reese does not seem to have either an easy

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110. Reese views the Restatement test as a catalyst towards the Utopian aim of clear and definite rules for settlement of choice of law matters. He asserted, "I believe that one ultimate goal, be it ever so distant, should be the development of hard-and-fast rules of choice of law. I believe that in many instances these rules should be directed, at least initially, at a particular issue. And I believe that in the development of these rules consideration should be given to the basic objectives of choice of law, to the relevant local law rules of the potentially interested states and, of course, to the contacts of the parties and of the occurrence with these states." L. M. Reese, II Hague Recueil I, at 180 (1976). Shapira views it as "schizophrenic" in trying to correlate a jurisdiction-selection structure with rule-selection interest analysis. *See* Shapira, *supra* note 103, at 214.

111. *See* North, *supra* note 5, at 128.

familiarity with, or a particularly keen interest in the law of divorce, and especially the law of marriage."[112]

It is all the more surprising that United States's interest analysis has failed to greatly impact on this area given the issue specific questions that accrue. Marriage as an institution is fundamental to society. Different states have an interest in the relationship, and may seek to regulate status in a variety of different forms by prohibiting certain marriages. In circumstances where the parties are married and make their home in their common pre-nuptial domicile, then only one state is interested. Often, however, a number of competing states have an interest in the marriage when, for instance, the parties are domiciled in different states prior to the marriage, or when the marriage was celebrated in still another state, or where the parties effected a change in domicile soon after the ceremony. It is self-evident that analysis is required of the interests of these states in ruling on the validity or otherwise of the union. Moreover, as well as the public interests of the concerned countries, there will also be the interests of the respective parties to the marriage. In marriage, contrary to the general position for most torts, there is normally a degree of forethought involved, and an expectation that their relationship will be validated. It is important that these expectations should not be easily frustrated. Similarly, it is desirable that, to the greatest extent possible, choice of law rules applicable to marriage ought to be as clear, precise, and certain as possible. This is not simply so that the parties can foretell with confidence the law governing their relationship, but also to facilitate the task of marriage registrars, immigration officers, and social security staff.[113]

It is submitted that what is required for the future is a more functional approach to marital validity. At the outset it was intimated that interest analysis *per se* is inadequate as a theoretical perspective to govern all matters of capacity.[114] The case by case development of interest analysis is eminently uncertain, what was referred to as the special brand of casuistic "Khadi-justiz" (ad hoc decisions deduced from mystical references to interests), and dated rule-skepticism. A role does exist, however, for interest analysis on an issue by issue basis rather than a case by case scenario. What is propounded is a form of depecage whereby the main categories of essential validity are demarcated, the wheat is separated from the chaff, and choice of law rules recategorized to fit the specific matters. The five main categories, or

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112. *See* Baade, *supra* note 15, at 380.

113. *See generally* Swan, *supra* note 6, at 16.

114. *See supra* note 13.

impediments to marriage, have been stated to incorporate the following: nonage, remarriage after divorce, consanguinity and affinity, polygamy, and lack of consent.[115] These impediments need to be evaluated independently, looking at the epicenter of competing public interest of different states as set against the interest of the parties to the union. The aim of this recategorization is to formulate certain and predictable choice of law rules which are molded to take account of the individualistic requirements of each issue, eschewing broad jurisdiction-selection.[116] In order to obtain an appropriate choice of law rule the focus will be on the teleological and sociological basis for each particular impediment, a concentration upon which law in reality has the most pertinent interest in the validity of the marriage, and exploration of the underlying policy and social factors shaping each rule.[117] This approach, as we have already encountered,[118] has received judicial support in England in the context of the validation of polygamous marriages.

> It is an over-simplification of the common law to assume that the same test for purposes of choice of law applies to every kind of incapacity—marriage, affinity, prohibition of monogamous contract by virtue of an existing spouse, and capacity for polygamy. Different public and social factors are relevant to each of these types of incapacity.[119]

In adopting a sensitive policy-oriented approach to issues of marital validity it is hoped that optimal solutions can be reached for rule formulation. These rules need to be as certain, appropriate, and simple as possible for the benefit of all concerned parties. The five categories, suggested above, will be considered sequentially, adopting an Anglo-American comparison of relevant leading jurisprudence to arrive at preferred conclusions on recategorized issue formulation. It will become evident that certain resonances spin a not so subliminal thread. This perspective avoids the scylla of jurisdiction-selection on one side of the scales, and the charybdis of case by case rule-selection at the other extreme. It is arguably a mature

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115. *See generally* Jaffey, *supra* note 41; Downes, *Recognition of Divorce and Capacity to Remarry*, 35 INT'L & COMP. L.Q. 170 (1986); North, *supra* note 70.

116. *See* North, *supra* note 70, at 37.

117. *See* Davie, *supra note 12,* at 39-45.

118. *See infra* p. 12; *supra* note 44.

119. Radwan, [1973] Fam. 35, at 51.

solution to deal with a choice of law matter that has been appallingly neglected on both sides of the Atlantic and is certainly ripe for a fresh reconsideration.

III. THE IMPEDIMENT GROUNDS

A. Non-age

A myriad of underlying policy concerns are promulgated by a rule prescribing a minimum age for marriage. There is a perceived need to protect an immature individual from the hazards of a premature marriage.[120] It is in the public interest to prevent marriages that are likely to be unstable. Additionally, a state has an interest in preventing its own domiciliaries from sexually exploiting children. These interests were addressed in *Pugh v. Pugh*,[121] the leading English authority on the issue.

In *Pugh*, a marriage was celebrated in 1946 in Austria between a fifteen year-old girl domiciled in Hungary and a British army officer who, although then stationed in Austria, was domiciled in England. England was the place of the intended matrimonial residence. The young girl was a refugee in Austria, having fled Hungary a year before the wedding was solemnized. The parties lived together in various places where the husband was stationed, eventually settling in England in 1950, whereupon the wife petitioned for nullity on the ground of non-age. The petition was successful, and the marriage was declared void. This was deemed to be the effect of English statutory legislation on minimum age requirements. Under section 1 of the Age of Marriage Act of 1929, there was prohibited a marriage, "between persons either of whom is under the age of sixteen." Thus, the court decided that the Act had extraterritorial effect and was intended to, "affect that capacity on all persons domiciled in the United Kingdom wherever the marriage might be celebrated."[122] The consequential outcome was that the statute was interpreted as preventing an English domiciliary from entering into a valid marriage if either spouse was under the minimum age limit of sixteen. It was treated as irrelevant that the girl had capacity under both Austrian and Hungarian law, the other interested legal systems in the validity of the marriage, to enter into the union.

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120. *See* Jaffey, *supra* note 41, at 45; Hartley, *supra* note 5, at 577; Smart, *supra* note 14, at 230; North, *supra* note 44, at 57-69.

121. *See generally* Pugh, [1951] P. 482.

122. *Id.* at 493. *See* The Marriage Act of 1949, § 2.

This decision has been subjected to adverse criticism in that it is viewed as inappropriate to give extraterritorial paternal impact to English law.[123] It was the policy of Hungarian law that sufficient protection was afforded to its nationals by permitting them to avoid their marriage before they obtained seventeen years of age. The wife had not effected this and indeed a child had been born to the union.[124] In such circumstances it has been legitimately asked, "was it really the object of the statute to protect middle-aged English colonels from the wiles of designing Hungarian teenagers?"[125] There has been further opprobrium in that the decision failed to appreciate the competing policy objectives of interested states. An interest analysis approach has been propounded as achieving a better outcome.[126] Smart has submitted that English law had no reason to invalidate the marriage because the English domiciliary was old enough to marry. There was also no reason to invalidate the marriage by Hungarian law as the Hungarian domiciliary had capacity.[127] Hence the case is viewed as involving a "false conflict," even though England was the intended matrimonial residence.[128]

In order to establish the most esculent rule for non-age, best aesthetically suited for the impediment, it is important to explore further the policy objectives that are implicated. As far as English marriage law policy is concerned they were expounded in *Pugh v. Pugh* by Justice Pearce in the following terms:

> According to modern thought it is considered socially and morally wrong that persons of an age, at which we now believe them to be immature and provide for their education, should have the stresses, responsibilities and sexual freedom of marriage and the physical strain of childbirth. Child marriages are by common consent believed to be bad for the participants and bad for the institution of marriage. Acts making carnal knowledge of young girls an offence are an indication of modern views on this subject. The remedy that 'the Parliament' has

123. *See* MCCLEAN, *supra* note 16, at 159; *see also* Fentiman, *supra* note 14 at 256.

124. *See* Clarkson and Hill, *supra* note 16, at 323.

125. MCCLEAN, *supra* note 16, at 159.

126. *See generally* Fentiman, *supra* note 14 at 256; Fentiman, *supra* note 14 at 353.

127. *See* Smart, *supra* note 14, at 233-34.

128. *See id.*

> resolved for this mischief and defect is to make marriages void where either of the parties is under sixteen years of age.[129]

In protecting an individual from the hazards of a premature marriage it seems inconceivable that English policy concerns ought to extend to foreigners from other states, whose own peculiar domiciliary law deem them as lacking any requirement of protection. The cathartic aim of excluding all marital instability is undoubtedly a noble sentiment, but in reality, it is only implicated where the parties establish a matrimonial residence within the relevant *lex fori*. This occurred in *Pugh* as the parties did come eventually to live in England; a ground which some believe may justify the outcome of invalidity.[130] However, this perspective seems unduly paternalistic and chauvinistic in that English law is seeking to prescribe the age of maturity for an individual who before the marriage belongs to a foreign legal system. In such a situation due regard should generally be accorded to the social mores and culture of the country to which the party actually belongs, to which they are immolated, and which has legitimately determined that person has sufficient maturity to marry. The issue of maturity is best left to be determined by the pre-nuptial domiciliary law of whichever country the individual belongs; if Hungary has determined a girl of fifteen can marry, or Nigeria that thirteen is apposite, or in South American countries such as Columbia and Paraguay that boys can marry at fourteen and twelve for girls, and this judgement is respected by members of its own community, then validation of the marriage should not infringe English policy concerns even where the matrimonial residence is established in England.[131] This approach demonstrates an appreciation of international comity (state comity at the lower level), and shows an enlightened perspective on a shifting development of national child maturity levels that is not out of kilter with modern times. In essence, the point is that:

> since children may develop socially and emotionally, and even physically, at different rates in different environments, it seems sensible for English law to rely on the judgement of the law of the country to which a party belongs for the decision whether he or she is mature enough to marry.

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129. *See* Pugh, [1951] P., at 492.

130. *See* Hartley, *supra* note 5, at 577.

131. *See generally* Jaffey, *supra* note 41, at 45-46.

As we have seen in *Pugh*, the English rule, by which a marriage is void if *either party* is under sixteen, applied to invalidate a marriage where a husband, aged over sixteen, was domiciled in England, while the wife, aged fifteen, was domiciled in a country by whose law the marriage was valid. It is submitted that this perfunctory outcome cannot be supported by the underlying policy objectives that apply to non-age. The appropriate choice of law rule to govern this particular impediment is that a marriage will only be invalid if either party is below the permitted age according to the pre-nuptial domiciliary law of *that party* at the time that the marriage occurs. This more liberal choice of law rule[132] would have led to marital validity in *Pugh* and is generally conducive to a presumption of marital validity, whilst being sensitive to the policy-orientated interests of respective states. It obviates any role being generally applied to the laws of the matrimonial home, although, as suggested below, exceptions may apply in very limited cases on the basis of overriding public policy considerations qua *lex fori*. The proposed test has the advantage of dealing satisfactorily with hard cases involving separate pre-nuptial domiciles but no established matrimonial home. Overall, it represents the optimal solution to deal with this ground of marital invalidity.

It was accepted as a valid approach in *Mohamed v. Knott*,[133] a case where both spouses were Nigerian and domiciled in Nigeria when they married. At the time of the marriage, the husband was twenty-six, but the wife only thirteen, the marriage being valid under Nigerian law, even though the parties came to live in England some three months after the marriage. It was determined that the marriage would be recognized in England as a valid marriage; under the prenuptial domiciliary laws of the parties there was capacity to enter into the union.

In the United States, there is a paucity of leading cases on the matter of non-age.[134] The two main authorities commonly referred to are *Wilkins v. Zelichowski*[135] and *State of Arkansas v. Graves*.[136] They demonstrate an

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132. *See* Hartley, *supra* note 5, at 577. The law is more liberal than the outcome in Pugh, but less so than an intended matrimonial home test referring to only one system of law, and less liberal than Hartley's alternative reference test that a marriage be valid if so under either party's domiciliary law. *See id.*

133. Mohamed v. Knott, 1 Q.B.1 (Q.B. Div'l Ct. 1969).

134. *See supra* note 93.

135. *See generally* Wilkins, 140 A.2d 65 (1958).

136. *See generally* Graves, 307 S.W.2d 545 (1957).

unwelcome degree of judicial atavism and a polarity in choice of law sensitivities.[137] It has been suggested herein that a suitable Anglo-American choice of law rule for non-age is that a marriage should only be held invalid on the ground of lack of age if a party is too young by the law of his or her own domicile at the time of the marriage. In order to test the functionality of this perspective, and to invest it with a patina of intellectual respectability, it is illuminating to apply it to the aforementioned jurisprudence of the United States to see if it is logically compelling.

The decision in *Wilkins v. Zelichowski,* represents the paradigmatic textbook case of runaway under-age marriage. The parties were domiciled in New Jersey. They wished to marry, but the girl, aged sixteen, was under the minimum age of eighteen imposed by New Jersey policy marriage requirements. Accordingly, the couple ran away to Indiana where they went through a ceremonial marriage because "it was the quickest place" and where females of sixteen were capable of marriage.[138] After the ceremony, they returned immediately to New Jersey to make their home, and a child was born ten months later. As it transpired the birth of the child marked the final happy event for the marital union for very soon thereafter the defendant husband was convicted of several car thefts and was placed in a reformatory.

The plaintiff thereupon brought an action for annulment in New Jersey. The intermediate appellate court[139] determined that an annulment would be in the best interests of the woman and of the couple's child, but ruled that under New Jersey conflicts rules, the laws of Indiana, as the state of place of celebration, served to give the couple capacity to marry. In such circumstances, the intermediate appellate court refused to annul the marriage. This judgement was reversed on appeal by the Supreme Court of New Jersey. No immutable rules were stated to apply to this choice of law matter; rather, it undertook an independent analysis of the facts in issue. This new review of the facts revealed that the only interests of Indiana related to conformity with their requirements on ceremonial formalities. It was the law of New Jersey that was found to be the only factor relevant to the selection of a law to govern capacity.[140] Prominent mention was also made by the court of its

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137. *See* Baade, *supra* note 15, at 359-361; Maddaugh, *supra* note 4, at 133; Fine, *supra* note 15, at 39-40; North, *supra* note 5, at 146-150.

138. Note, *The Formalities Essential to a Valid Marriage in Indiana*, 34 IND. L.J. 643 (1958-59).

139. *See generally* Wilkins v. Zelichowski, 129 A.2d 459 (N.J. Super. Ct. App. Div. 1957).

140. *See* Wilkins v. Zelichowski, 140 A.2d 65, 68 (N.J. 1958).

belief that the annulment would be in the best interests of the child, and by reason of a New Jersey statute would not make the child illegitimate.

The central tenet of the decision, expressed in the following passage from the court judgement, was that the strong public policy of New Jersey was applicable and remained determinative even though the marriage itself occurred elsewhere:

> It is undisputed that if the marriage between the plaintiff and the defendant had taken place here, the public policy of New Jersey would be applicable and the plaintiff would be entitled to the annulment; and it seems clear to us that if New Jersey's public policy is to remain at all meaningful it must be considered equally applicable though their marriage took place in Indiana. While that state was interested in the formal ceremonial requirements of the marriage it had no interest whatever in the marital status of the parties. Indeed, New Jersey was the only State having any interest in that status, for both parties were domiciled in New Jersey before and after their marriage and their matrimonial domicile was established here. The purpose in having the ceremony take place in Indiana was to evade New Jersey's marriage policy and we see no just or compelling reason for permitting it to succeed.[141]

The decision in *Wilkins v. Zelichowski* is representative of an orthodox approach to non-age.[142] In a situation where the state of common domicile imposes a more restrictive age requirement than the state of celebration, and the courts are not directed to decide otherwise by local statute, they have tended to universally invalidate young persons' marriages as contradicting their strong public policy.[143] This has been in circumstances where the parties have returned to live in their original domiciliary state.

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141. *Id.* at 67-68.

142. *See* Bays v. Bays, 174 N.Y.S. 212, 217 (Sup. Ct., Cortland Cty. 1918); Portwood v. Portwood, 109 S.W.2d 515 (Tex. Civ. App. 1937) (upholding the validity of the marriage contract in the converse situation of validity under the consorts common domicile law, but invalidity under place of celebration).

143. *See* Fine, *supra* note 15, at 38.

A mirror image of *Wilkins v. Zelichowski* is the Oklahoma case of *Ross v. Bryant*[144] that involved another run-away underage marriage. A girl, aged fourteen, decamped with her boyfriend from her parents' home in Oklahoma to Arkansas where the young couple married. The girl satisfied the minimum age requirements of the place of celebration. The parties then returned to Oklahoma, their pre-nuptial domiciliary states, and sought to reside together. The Oklahoma Court annulled their "marriage" on policy grounds. There was an underlying concern for regulating the age at which young Oklahomans might begin to form new family units within the state borders. The primacy of the interests of the state of domicile was clearly paramount,[145] and overrode any state of celebration presumptions.

By way of contrast, it is interesting to examine *State of Arkansas v. Graves*,[146] decided just a few months before the decision of the Supreme Court of New Jersey in *Wilkins v. Zelichowski*. The cases are totally contradictory in outcome and approach. The interested parties were all resident and domiciled in Arkansas. The thirteen-year-old girl and her seventeen-year-old husband left Arkansas to marry in Mississippi with the consent of their parents, and then they immediately returned to Arkansas to live. Their marriage was valid under the subsisting law of the place of celebration, but both parties were under age according to the law of Arkansas, their pre-nuptial domiciliary law. Subsequently the parents of the thirteen-year-old girl were prosecuted for the offense of contributing to the delinquency of a minor on the premise that the parents had consented to her entering a wholly void marriage. The crucial issue thus focused upon the validity of the marriage. In a perplexing decision, the validity of the marriage was acceded to by the Supreme Court of Arkansas. The general presumption was to apply a place of celebration rule unless displaced by an Arkansas statutory provision declaring void a marriage validly entered into in another state, or unless the marriage offended the strong public policy of Arkansas.[147]

As to the former no such statutory provision existed, and as to the latter the court concluded, "there is no strong public policy in this State requiring the courts to declare that marriages such as the one involved here are void *ab initio*."[148] An unsatisfactory outcome was reached by the

144. *See generally Ross*, 217 P. 364.

145. *See generally Sirois*, 50 A.2d 88.

146. *See generally Graves*, 307 S.W.2d 545.

147. *See id.* at 550.

148. *Id.* at 549.

adoption of a rigid and inappropriate jurisdiction-selection rule.[149] The adoption of a choice of law rule referring all matters of essential validity to the law of the place of celebration seems the apotheosis of absurdity. Children who were resident and domiciled in Arkansas, who briefly visited Mississippi to solemnize a marriage, and then returned to their original state, were able to contumeliously disregard the social mores and culture of the state to which the parties belonged and had determined that they had insufficient maturity to marry therein.

The test propounded herein is to apply a choice of law rule for non-age that applies the domicile law of the respective parties. It has been suggested that a marriage will only be invalid if either party is below the permitted age according to the pre-nuptial domiciliary law of that party at the time that the marriage occurs. The application of this test would have provided a suitable panacea to the unwelcome outcome in *State of Arkansas v. Graves*. The parties under their pre-nuptial domiciliary law of Arkansas, lacked capacity to marry because they failed to meet the minimum age requirement, and thus, *cadit quaestio*, their "marriage" in Mississippi would be declared invalid. This result would not be replicated by applying the Restatement Second which, as we have seen, applies a place of celebration test subject to displacement where the strong public policy of the state of most significant relationship is infringed. On the facts it is clear that Arkansas would be the state of most significant relationship, but as held by the Supreme Court of Arkansas, there was no prevailing strong public policy requirement to strike down the valid union under the place of celebration test, nor was any marriage evasion statute enacted. The preferred rule-selection test adduced in this section would also legitimately precipitate marital invalidity in *Wilkins v. Zelichowski* in the run-away marriage scenario, where the parties fruitlessly attempted to evade ante-nuptial domiciliary law.[150]

In very limited cases, the general ante-nuptial domicile rule-selection test may need to be ameliorated to deal with public policy concerns of the *lex fori* where the parties set up their matrimonial residence within state borders. An illustration of the need for this flexible discretion is illustrated under English law by the example where the marriage of a child below the age of

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149. *See generally* Samuel Bare, *Significance of Puberty in Nonage Marriages*, 16 WASH. AND LEE L REV. 87 (1959).

150. This would arguably also be the outcome under the test of the Second Restatement. The marriage was valid under the place of celebration, Indiana, but by the proviso to § 283 (2), it would be invalid if it violated the strong public policy of New Jersey. According to Reese, this self-evidently would be the case with public policy leading to non-recognition. *See* Reese, *supra* note 108, at 166-71. *See also* North, *supra* note 5, at 147.

puberty is valid by the law of her domicile, but nonetheless English public policy qua *lex fori* would intervene to invalidate the foreign marriage where the matrimonial residence was established within the territory.[151] Apart from these rare cases the ante-nuptial dual domicile rule should apply, even to "child" marriages as in *Mohamed v. Knott.*

The marriage was declared valid in this case, quite correctly it is suggested, even though the thirteen-year-old Nigerian girl with her twenty-six-year-old husband came to live in England. There may be associated other difficulties incumbent to the relationship, such as compliance with regular school attendance, welfare concerns over whether the young girl needs to be taken into care, and matters of criminal law including whether liability be imposed if sexual intercourse occurs,[152] but these are separate concerns facilitated by wholly different policy issues then the initial question of marital validity.[153]

What about the converse situation to *Pugh v. Pugh* where a young female domiciliary, under the minimum age of marriage according to her domiciliary law, marries an older man abroad and establishes a matrimonial home in a state by whose law the marriage is valid? Should the rule-selection choice of law test of ante-nuptial domicile law still apply where the link to domicile is more attenuated?[154] In this regard Dr Cheshire stated:

> If a girl aged fourteen wishes, contrary to the law of England, to marry a foreigner domiciled in a country whose law permits marriage at this early age, it may justifiably be doubted whether there is any defensible ground upon which English law can regard the union as void. The social life of England is unaffected, for the girl loses her connection with this country upon the acquisition of her husband's domicile.[155]

Despite the above analysis, and with respect to Dr Cheshire, his perspective fails to recognize that a key aspect of the policy underlying the

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151. *See* Jaffey, *supra* note 41, at 46.

152. This issue was left unresolved in *Mohamed v. Knott*, but Lord Parker C.J. opined that it was unlikely that a successful prosecution could be commenced by the police. *See* Mohamed, 1 Q.B. at 10.

153. *See* CLARKSON AND HILL, *supra* note 16, at 322-25.

154. *See* Smart, *supra* note 14, at 234.

155. CHESHIRE, PRIVATE INTERNATIONAL LAW 155 (1935); *see also* CHESHIRE AND P.M. NORTH, PRIVATE INTERNATIONAL LAW 333 (10th ed. 1979).

impediment of non-age is to protect young people whom their domiciliary states consider to be insufficiently mature to lead a normal married life, and to safeguard them from being led astray or even taken from their homes. Suppose, for example, that a Texan girl of thirteen marries a Colombian in Colombia, and the parties settle there after their "marriage." Or suppose that an English girl of fifteen marries an Austrian in circumstances where place of celebration and matrimonial residence coincide. In each hypothetical situation the "marriage" ought to be invalid. The purpose of the non-age rule, unlike impediments of polygamy or consanguinity, is not simply concerned with protecting the public interest but looks to the personal interest of the immature party in circumventing the dangers of premature marriage.[156] Upholding the marriage would defeat the requisite policy objective, and a dual ante-nuptial domicile test should reign supreme for this specific issue.

B. Marriage and Divorce Recognition: The Incidental Question

The essence of this article has been to argue that it is realistic to construct a coherent approach to choice of law in the area of validity of marriage through depecage, splitting down the traditional category into smaller units, each restricted to genuinely related issues. It has been propounded that for each delineated category there needs to be a separate connecting factor designed to make a policy-based link between all the related issues in the category and the abstractly defined state whose law is to apply.[157] One area of Anglo-American law where this pragmatic approach has already become supererogatory is where the rules for the recognition of foreign divorce or annulment come into conflict with the choice of law rules relating to capacity and bigamy,[158] raising directly what is known as an

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156. An English docimiciliary cannot avoid the incapacity to marry by changing her domicile, for she does not acquire capacity to change her domicile until she is either 16 or validly married.

157. *See generally* Downes, *supra* note 113; *see* K. *Lipstein, Recognition of Divorces, Capacity to Marry, Preliminary Questions and Depecage,* 35 INT'L & COMP. L.Q. 178, 182 (1986).

158. Private international law cases involving bigamous marriages are hard to find as it is rare for a second marriage ceremony to transpire without any prior effort to officially end the first marriage. However, it seems clear that capacity to effect the second marriage is a matter for the law of the ante-nuptial domicile. *See generally Prawdic-Lazarska,* 1954 S.C. 98. More significant are authorities involving an earlier divorce or annulment followed by a second marriage. *See generally* North, *supra* note 70, at 38.

incidental question.[159] The response has been to fashion a specific preference in favor of upholding the validity of the later marriage through primacy attached to divorce recognition.[160] The traditional category of marriage validity, the orthodox dual domicile rule, has been superseded in England through rectification achieved by statutory legislation contained in section 50 of the Family Law Act of 1986;[161] in the United States recategorization has occurred through divorce recognition rules being established at a federal rather than a state level[162] and via the mechanism of characterization facilitated by judicial sleight of hand to redefine the associated issues.[163] This functional perspective on choice of law rule-selection has been applied adventitiously to a separate category of validity, and represents a template for other areas. It avoids the stultifying effect of a rigid and often inappropriate jurisdiction-selection rule being applied to all issues of capacity.[164] Prior to the rectification of English principles by the Family Law Act of 1986, the leading case addressing the issue of priority between divorce recognition and capacity to marry was *Lawrence v. Lawrence*,[165] an authority that succinctly highlighted the ambit of the problem raised by the incidental question.

In *Lawrence,* there was an explicit clash between the choice of law rules to determine the validity of the second marriage and those for recognition of a foreign divorce.[166] The wife, a Brazilian national and

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159. The issue of the incidental question is succinctly defined by Clarkson and Hill. *See* CLARKSON AND HILL, *supra* note 16, at 239. "An incidental question arises when one country's conflict rules lead to a foreign law, but under that law an incidental or subsidiary question arises which can only be resolved by an application of a further conflicts rule governing that incidental question. The issue is whether that incidental question should be governed by the conflicts rule of the foreign law (the *lex causae* approach) or the conflicts rule of the forum (the *lex fori* approach)." *Id.*

160. *See generally* MCCLEAN, *supra* note 16, at 160-63; NORTH AND FAWCETT, *supra* note 16, at 603-05.

161. *See generally* A.J.E. Jaffey, *The Incidental Question and Capacity to Remarry*, 48 MOD. L. REV. 465 (1985); A. Briggs, *Conflict of Laws: Postponing the Future?*, 9 OXFORD J. LEGAL STUD. 251.

162. *See* Baade, *supra* note 15, at 342-43.

163. *See* Fine, *supra* note 15, at 31.

164. *See* North, *supra* note 70., at 38.

165. *See generally* Lawrence, [1985] Fam. 106. The decision promulgated a great degree of academic comment. *See generally* J.G. Collier, *Conflict of Laws—Foreign Divorces and Capacity to Marry—Judiciary and Jurists,* [1985] CAMBRIDGE L.J. 378; P.B. Carter, *Capacity to Remarry After a Foreign Divorce,* 101 L.Q.R. 496 (1985); P.B. CARTER, THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 1986, 441 (1987); Jaffey, *supra* note 41 at 160; Downes, *supra* note 113; Lipstein, supra note 156.

166. *See* Smart, *supra* note 14, at 238-39.

domicile of that country, married Robert Harley in Brazil. Subsequently, the couple separated and the wife conducted a second marriage ceremony with the petitioner in Nevada. Immediately before the marriage ceremony in Nevada the wife had obtained a divorce from her first husband in a Nevada District Court. This Court had taken jurisdiction on the basis of the wife's "domicile" in the state. Under Nevada law, the fact that she had resided in Las Vegas for more than six weeks was a sufficient foundation for jurisdiction under the law of Nevada. There was no dispute that this divorce was entitled to recognition in English law under the existing divorce legislation.[167] However, there was also no dispute that the wife's ante-nuptial domicile was Brazil, and under that law, her Nevada divorce would not be recognized since in that country marriage is regarded as indissoluble. Thus, the decree would be treated as if it were a mere judicial separation. The couple moved to England, whereupon the husband petitioned for a declaration that the marriage between him and the wife, which had been celebrated in Nevada in 1970, was valid and subsisting. This petition was contested by the wife on the ground that at the time of the marriage she lacked capacity to enter into the Nevada marriage.

As Downes has stated,[168] the case raised a classic incidental question for the English court.[169] The capacity to marry conflicts rules pointed to the *lex causae* being applied, the Brazilian domiciliary law of the wife, by which the second marriage was invalid. On the opposite side of the coin, the conflicts rule for divorce recognition intimated that the *lex fori* provisions be applied, by whose terms the first marriage had been validly dissolved allowing the second marriage to be validly conducted.[170] By applying both sets of private international law rules the bizarre conclusion would be that she was a single woman who was incapable of remarrying. Prior case precedents were of little help in resolving the dispute given the degree of vicissitudes contained therein.[171]

Both the trial court and the English Court of Appeal upheld the validity of the second marriage. At first instance, Justice Lincoln circumnavigated the incidental question altogether by determining that the wife's capacity to remarry was governed not by the law of her domicile but

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167. *See* Downes, *supra* note 113, at 171.

168. *See id.*

169. *See supra* note 158.

170. *See generally* A.H. ROBERTSON, CHARACTERISATION IN THE CONFLICT OF LAWS 149 (1940); A.V. LEVONTIN, CHOICE OF LAW AND CONFLICT OF LAWS 91 (1976).

171. *See generally* Shaw, 3 L.R.-E. & I. App. 55 (1868); Brentwood, 2 Q.B. 956 (1968); Padolecchia, [1968] P. 314; In the Marriage of Barrigia (No. 2), 7 Fam. L.R. 909 (1981).

by the law of the intended matrimonial home, the law of the country with which the marriage had its most real and substantial connection.[172] The result, but not the reasoning, was followed by the Court of Appeal[173] who applied a novel solution. Primacy was accorded to the specific English rules on recognition of foreign divorce, and under those rules the wife was entitled to have her Nevada divorce recognized. Since the wife was treated by the *lex fori* as a single woman her later marriage was permissible and could not be declared void on the ground of her bigamy. The *lex fori* provisions consequently reigned supreme over the *lex causae* Brazilian conflicts rule on recognition of foreign divorce.[174] Interestingly in the converse situation an Ontario court[175] upheld the validity of a second marriage where the divorce was recognized under the *lex causae* (the wife's domiciliary law) but not under Ontario divorce recognition principles.

The predominance accorded to divorce recognition over capacity rules, implicitly established in *Lawrence* to resolve the incidental question,[176] was explicitly adopted a year later by the English Parliament. Section 50 of the Family Law Act of 1986 provided:

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172. Indyka, [1969] 1 A.C. 33 (extending to the area of capacity to marry a test used previously only for recognition of divorce, under the old common law rules, and nullity decrees). *See also* Law v. Gustin [1976] Fam. 155.

173. *See* Lawrence v. Lawrence, [1985] Fam. 106.

174. *See* Downes, *supra* note 113, at 172-73.

175. *See generally* Schwebel v. Ungar, 42 D.L.R. (2d) 622 (Ont. Ct. App. 1963); Schwebel v. Ungar, 48 D.L.R. (2d) 644 (Can. 1964); K. Lysyk, *Conflict of Laws–Status–Capacity to Marry–Recognition of Prior Foreign Divorce–The Incidental Question*, 43 CAN. BAR. REV. 363 (1965). In this case a husband and wife, both Jewish, were initially Hungarian domiciliaries. They decided to emigrate to Israel, but whilst on route effected divorce proceedings in Italy through the Jewish ghet process; separate domiciles were then acquired in Israel. Subsequently, the wife entered into a second marriage in Ontario during a temporary stay therein; the earlier ghet process effectively dissolved the first union under Israeli law, but not in accordance with Ontario divorce recognition principles. However, the validity of the second marriage was upheld on the premise that immediately prior to the remarriage the wife's status by her domiciliary law was that of a single person. Capacity rules were given primacy over state divorce recognition. *See id.*

176. Davie has argued that the issue of remarriage after divorce (and also polygamy) should be tested by the law of the matrimonial domicile. In his view where there is no matrimonial domicile, reference should be made to the parties' ante-nuptial domiciliary laws on the premise that one of these states will in all probability, become the matrimonial domicile. If both domiciles concur on this issue, their provisions are determinative. In the case of conflict, the presumption of marital validity should be used and the marriage declared valid. *See* Davie, *supra* note 12, at 50-52.

> Where, in any part of the United Kingdom: (a) a divorce or annulment has been granted by a court of civil jurisdiction, or (b) the validity of a divorce or annulment is recognised by virtue of this Part, the fact that the divorce or annulment would not be recognised elsewhere shall not preclude either party to the marriage from re-marrying in that part of the United Kingdom or cause the remarriage of either party (wherever the remarriage takes place) to be treated as invalid in that part.

The English pragmatism in this area has been replicated in the United States through the functional establishment of federal rules covering divorce recognition and capacity to remarry. Baade[177] has enunciated three deeply entrenched rules of constitutional magnitude that govern divorce recognition. First, there exists an autonomous power of the domiciliary state of one of the spouses to unilaterally dissolve a marriage *ex. parte*, with no subsisting requirement for the establishment of jurisdiction over the respondent spouse.[178] Second, a divorce obtained in *ex. parte* circumstances remains vulnerable to collateral attack in the domiciliary state of the respondent spouse on the premise that domicile was inaccurately adjudged to prevail in the original set of proceedings.[179] Third, if both parties have appeared in the original proceedings, an *inter partes* divorce process, then any divorce based on the jurisdictional touchstone of domicile is binding on sister states to the same degree as it is in the state which rendered the original decree.[180]

As far as the recognition of foreign country divorces is concerned, no distinction is made in the Second Restatement between sister state and international conflicts in the divorce sphere. It is assumed without demur that foreign and sister-state connecting factors rank *pari passu*, but similarly that recognition of foreign country divorces should, *mutatis mutandis*, be ruled by the same principles as govern the recognition of sister-state divorces.[181] There is enshrined here a rule for divorce recognition, superseding any choice of law issues of capacity, which is jurisdiction-

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177. *See* Baade, *supra* note 15, at 342-43.

178. *See generally* Williams v. North Carolina, 317 U.S. 287 (1942), summarized in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 71, 73 (1971).

179. *See generally* Williams v. North Carolina, 325 U.S. 226 (1945).

180. *See generally* Sherrer v. Sherrer, 334 U.S. 343 (1948), summarized in RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 73 (1971).

181. *See* Baade, *supra* note15, at 345.

selective within the constitutional framework. It is predicated upon universality as to the meaning of "domicile," and embodies a presumption in favor of the automatic application of the *lex fori* in divorce cases that mirrors the English development. The rules provide a certainty of approach that is logically compelling within a hierarchical structure.[182]

Outside of the federal sphere, courts in the United States have demonstrated a palpable degree of judicial creativity in accepting that whilst a marriage can be valid for one specific purpose, it can be invalid for another. In the context of the inter-relationship between conflicts rules on divorce recognition and capacity to remarry, the decisions in *Estate of Borax v. Commissioner of Internal Revenue*[183] and *In re Ommang's Estate*[184] reveal a perceptible judicial re-categorization of relevant issues. The courts have indulged in a form of characterization to achieve a preferred outcome.

In *Estate of Borax v. Commissioner of Internal Revenue,* a divorce was obtained by the husband from his first wife in the liberal divorce state of Mexico. He soon remarried, but this latter marriage was challenged by his first wife before the New York courts on the premise that because the New York courts would not recognize the earlier divorce then the second marriage was invalid. This declaration was granted in the terms requested by the first wife. The declaration itself was treated as a *brutum fulmen* by the husband and the second wife who lived together and claimed tax deductions on the basis that they were validly married. Subsequently, the Commissioner of Internal Revenue claimed payment of tax underpaid through invalid claims for married person's allowance. However, in an infelicitous although logically compelling judgement, the United States Court of Appeals for the Second Circuit determined that they were prepared, despite the pre-existing New York decision, to view the Mexican divorce as valid and the second marriage, therefore, also valid for tax purposes. *Res judicata* was inapplicable. A bifurcated perspective was reached on divorce recognition and capacity to remarry determinable upon whether the issue in question was categorized as one pertaining to marital status or tax law. A radical parsing of the doctrine of precedent was outcome determinative.

A similar judicial recategorization occurred in *In re Ommang's Estate.* The parties, who wished to marry, were originally Wisconsin domiciliaries, but were barred from marriage since the woman had received

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182. *See generally* Swan, *supra* note 6, at 17.

183. 349 F. 2d 666 (1965), *cert. denied,* 383 U.S. 935 (1966). *See* Currie, 34 U. CHI. L. REV. 26, 64-75 (1966).

184. 235 N.W. 529 (1931).

a divorce within the past year. To circumvent this prohibition, they married in Minnesota, where the marriage was valid and returned straightaway to Wisconsin where they resided together for just under two years. Unfortunately, the union broke down and they separated, with the man establishing a new home in Minnesota, and some time later the "wife" went to live in that state with her daughter by a former marriage. Although the parties met on a number of occasions thereafter, they did not live together. Upon the man's death, the woman sought to administer his estate claiming that she was his widow. The decedent's half-sister contested this succession claim. She strenuously argued that the "marriage" would have been invalid by the Wisconsin courts because their domiciliaries had sought to evade their personal law. The woman lacked capacity because of lack of earlier divorce recognition under her ante-nuptial domicile law. However, the Minnesota court, mindful of the pre-eminent succession rights of the putative wife, determined in her favor. The court applied the "general rule that a marriage valid where performed is valid everywhere." In real terms, the court bypassed marital validity issues to effect a beneficial property resolution.[185]

In summary, the choice of law response in this area has been pragmatically to fashion a preference in favor of upholding the validity of the later marriage through primacy attached to divorce recognition. Where the rule for recognition of foreign divorce or annulment comes into conflict with the choice of law rule relating to capacity and bigamy, then the former has prevailed. In English law the *lex fori* dominates this issue through the impact of statutory legislation. In the United States, the synergistic effect of federal law and judicial recategorization have achieved a similar outcome. The single jurisdiction-selection rule for all matters of essential validity has been disregarded in this matter, and replaced by a compartmentalized perspective that is issue specific.[186] It should form a catalyst for policy-orientated reform of other impediment grounds to marital validity.

185. *See generally* Reese, *supra* note 5.

186. *See* North, *supra* note 70, at 38.

C. *Consanguinity and Affinity*

> If the ideas of men in various parts of the civilized world with respect to the classes of persons to, or between, whom marriage should be forbidden, were uniform it would be necessary, in any given case, merely to inquire whether the requisite means of manifesting assent to becoming married had been used.[187]

There are significant disparities between countries regarding the degree of cogent marriage restrictions imposed on related individuals. These impediments may apply not simply to blood relationships (consanguinity), but also to relationships established by marriage (affinity). The English response has been to adopt a rigid jurisdiction-selection test of dual domicile to both questions of consanguinity and affinity.[188] The jurisprudence of the United States reveals a startling vacillation in approach to the prohibited degrees of relationship matter.[189] It is submitted that a novel governing rule can beneficially be universally adopted that is policy sensitive to the different countervailing issues that are manifested. There arguably needs to be a demarcation of choice of law principles; an aesthetic distinction between prohibition on the ground of consanguinity, as opposed to invalidity that is predicated upon the affinity rules.

The policy behind invalidation of marriage on consanguinous grounds is to prevent relationships that are offensive to the social mores of the community where the parties reside.[190] There are sociological, religious, and moral grounds for the prevention of such unions.[191] Additionally, there is a concomitant desire to restrict inter-breeding that is too close.[192] The concern here is to avoid marriages that are thought to be eugenically harmful, with the risk of severely handicapped offspring. In essence, it is the public

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187. Charles W. Taintor, II, *Effect of Extra-State Marriage Ceremonies*, 10 MISS. L.J. 105, 105 (1938).

188. *See generally* Mette v. Mette 1 SW Tr 416 (1859); Sottomayor v. De Barros 3 P.D. 1 (P. 1877); Cheni [1965] P. 85.

189. *See generally* Maddaugh, *supra* note 4; Baade, *supra* note 15; Fine, *supra* note 15; Engdahl, *supra* note 15.

190. *See* Frederic P. Storke, *The Incestuous Marriage—Relic Of the Past*, 36 U. COLO. L. REV. 473 (1964); Henry H. Foster, Jr., *Marriage: A Basic Civil Right of Man*, 37 FORDHAM L. REV. 51, 61 (1968); Swan, *supra* note 6, at 37.

191. *See* North, *supra* note 5, at 135-36.

192. *See supra* note 11.

interest, rather than the personal interest of the respective parties, that predominantly lies at the heart of this particular incapacity.[193] Unfortunately the key cases in the United States on this area are bedeviled by inconsistencies which are illuminated in sharp focus by contrasting decisions on the validity of marriages between uncle and niece[194] and between first cousins.[195] They reveal a beguiling Hobson's Choice for the legal adviser, a potpourri of competing state and party interests that tend to obfuscate rational policy analysis.[196] In examining these cases it is suggested that an optimal solution can be extrapolated to govern this specific issue of capacity.

In re May's Estate[197] has proved enduringly controversial.[198] Two New York domiciliaries, an uncle and niece by the half blood, went to Rhode Island to marry and returned immediately (within two weeks of the ceremony) to live in New York. They made their home there for thirty-two years until the wife's death. They had six children together. Rhode Island law permitted such unions between Jews, but according to the law of New York, a marriage between uncle and niece was declared by statute to be "incestuous and void."[199] Subsequently, the "husband" sought to be appointed as administrator of his wife's estate, but this was contested by one of their recalcitrant daughters on the ground that the marriage was invalid. However, the uncle as widower of his deceased niece, was allowed by the New York Court of Appeals to succeed to her property.[200] Although the court determined that New York was the only state significantly affected by the question of capacity as it pertained to the litigious issue, nonetheless it held the relationship "not offensive to the public sense of morality to a degree regarded generally with abhorrence and thus not within the inhibitions of natural law."[201] This meant that the case called for the application of the general rule that a marriage valid where solemnized is valid in every other

193. *See* Jaffey, *supra* note 41, at 44-45.

194. *See supra* note 92.

195. *See id.*

196. *See* Maddaugh, *supra* note 4, at 124.

197. *See In the Matter of May*, 114 N.E.2d 4 (1953).

198. *See generally* Reese, *supra* note 5, at 258; Fine, *supra* note 15, at 62-63.

199. *See* N.Y. Dom. Rel. Law, ch. 19, § 5 (3). "A marriage is incestuous and void whether the relatives are legitimate or illegitimate between either: ... (3.) An uncle and niece or an aunt and nephew." *Id.*

200. *See May*, 114 N.E.2d at 7.

201. *Id.*

state; the consorts' capacity to marry was consequently submitted to Rhode Island law.[202]

In re May's Estate vividly exemplifies the truism that hard cases make bad law.[203] The merits of equitable property resolution supplanted the choice of law capacity issue. As Von Mehren and Trautman have stressed, the Court of Appeals may have been dissatisfied with the domestic outcome. "On occasion courts dealing with purely domestic problems seize upon irrelevant or insignificant factual distinctions to take a case out of the rule that would normally govern ...An aspect of this process of interest to us is the use of relevant or insignificant multistate elements to provide an escape valve from harsh or obsolescent domestic law."[204] New York Domestic Relations Law was overridden by the fact that the place of marriage celebration was outside state borders. Rhode Island, however, lacked any tangible interest in the resolution of the dispute. The focal point of the matter was New York, and its system of law ought to have been applicable. The parties resided therein for thirty-two years, they were immolated there, and the match was deemed intolerable to the social mores of New York. The marriage would have been denied validity if performed in that state and was no less abhorrent to that community because Rhode Island was the transient place of celebration.[205] It represents a dysfunctional abdication of a properly structured choice of law process.

In marked contrast stands the case of *Devine v. Rodgers*[206] where the system of law of the most affected state was given priority. A United States national, who was domiciled in Pennsylvania, married his niece in Russia, and then sought to establish her right to enter the United States as his wife. Under the existing Russian law there was capacity for Jews, such as this couple, to marry within the relevant degree of consanguinity.[207] However, the District Court of Pennsylvania denied entry to the niece on the basis that

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202. *But see* Catalano v. Catalano, 170. A.2d 726 (1961). The primary issue also focused on the validity of a union between an uncle and niece. Their relationship was held invalid by applying the law of the state of the husband's domicile where the spouses established their matrimonial residence. Hence, the wife was prevented from claiming a widow's right of support from the estate of her husband. *See id.*

203. *See* Reese, *supra* note 5, at 258-61 (justifying the decision).

204. *See* ARTHUR TAYLOR VON MEHREN & DONALD THEODORE TRAUTMAN, The Law of Multistate.

205. *See* Maddaugh, *supra* note 4, at 133

206. *See generally* Devine v. Rodgers, 109 F. 886 (Pa.D. 1901); *In re* Takahashi's Estate 129 P.2d 217 (Mont. 1942) (denying inheritance); State v. Bel, 7 Baxt. 9 (Tenn. 1872) (denying cohabitation).

207. *See id.* at 887.

the cohabitation of this couple in Pennsylvania would be offensive to the inhabitants of that state. The court opined:

> Whatever may be the standard of conduct in another country, the moral sense of this community would undoubtedly be shocked at the spectacle of an uncle and niece liking together as husband and wife; and I am, of course, bound to regard the standard that prevails here, and to see that such an objectionable example is not presented to the public.[208]

In *Devine v. Rodgers,* the capacity of an intending perambulatory immigrant to marry her uncle was submitted to the law of the matrimonial residence, which was the state identified as most affected by the impact of the proposed union. This intended matrimonial home test ought similarly to have been applied in *In re May's Estate* to invalidate the union under New York law; it was that system of law most closely associated to the consanguinous relationship. Public rather than private interest is most at stake here, and the purpose of the rule is to deny validity to a marriage that contravenes the social mores of the community where the couple actually resides, the place where they are inculcated.

The policy of a country will not significantly be impinged upon by a marriage where the marital home is established abroad, even in a situation where one of the parties had their pre-nuptial domicile in the forum state.[209] Consider for instance, a woman domiciled in New York who marries her uncle in Egypt, the uncle being a domiciliary of this latter state. In a scenario where the respective parties settle in Egypt after the marriage, no legitimate policy ground exists to invalidate the union. The system of law with the greatest interest in governing marital validity is Egyptian; this is the state and locale most impacted by the relationship. A marriage in such circumstances ought not to be invalid provided the parties establish a matrimonial home in

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208. *Devine*, 109 F. at 888. *See also* In the Matter of G, 6 I & N Dec. 337 (1954). Under Pennsylvania law, the court refused to allow the Italian niece of a Pennsylvanian domiciliary to enter the United States for permanent residence. *See id.* The couple had previously married in Italy. *See id. But see* In the Matter of T, 6 I & N. Dec. 529 (1960). A Czechoslovakian woman married her uncle, a Pennsylvanian domiciliary, in her home state abroad. *See id.* Her right to enter was allowed by the tribunal which declared that in 1960, "the state of the locus of their intended residence" would not view their relationship as a criminal infraction *See id.* at 531.

209. *See* Cheni [1965] P. 85. *See* Swan, *supra* note 6, at 35 (discussing Cheni).

a country by the law of which the union is valid, and the establishment of this home is within a reasonable time from the date of marriage celebration.[210]

There are similar vacillations in the United States in its treatment of marriage relationships between first cousins. In the well-known authority of *Meisenholder v. Chicago 8 N.W. Reg. Co.*,[211] first cousins domiciled in Illinois were within the prohibited degree of relationship under Illinois statutory law. They contracted marriage in Kentucky in conformity with the requirements of Kentucky law, and then returned to cohabit in Illinois. Subsequently, the woman claimed compensation as the surviving spouse of her first cousin under the provisions of the Federal Employers' Liability Act. The putative husband died in Illinois in the course of his employment, but suit was brought against the employer in Minnesota. The claim failed on the basis that the original "marriage" was invalid. Illinois law was determinative on the matter of the consorts' capacity to marry one another.

Similarly in *Schutt v. Siems*,[212] a first cousin marriage was also declared invalid. The couple married in Minnesota and had been denied a marriage license in Illinois where the woman was domiciled because they were first cousins. The marriage laws of Minnesota recognized the capacity of the parties to effect a valid union. The matrimonial residence was also established in Minnesota. Thereafter, the parties, as a married couple, petitioned the Illinois court to adopt a child. The court rejected the adoption and acted in the role of *parens patriae* for orphans. It held that the parties' marriage in Minnesota was "void" and "incestuous" under the governing *lex fori* principles. Illinois standards on capacity to marry were applied to a relationship where one of the parties was a pre-nuptial domiciliary of that state.

What would be the impact of the application of the proposed intended matrimonial home test for consanguinity issues on the validity of these two marriages? In the former case of *Meisenhelder,* the *ratio decidendi* would be unaffected. The parties resided in Illinois, and under that system of law the relationship was void. Hence, the actual outcome in the case of marital invalidity would be replicated. A contrary result, however, would apply in

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210. *See* Jaffey, *supra* note 41, at 44. According to Davie, if no matrimonial home is established then the court should, in cases of *both* consanguinity and affinity, refer to the parties' ante-nuptial domiciliary laws and rely on the presumption of marital validity as governing cases of conflict between these respective laws. *See* Davie, *supra* note 12, at 53.

211. *See generally* Meisenhelder v. Chicago N.W.R.R. Co., 213 N.W. 32 (Minn. 1927); *see* Reese, *supra* note 5, at 261-62 (discussing *Meisenhelder*); Fine, *supra* note 15, at 56-57 (discussing *Meisenhelder*).

212. *See* People v. Ludwig, 198 Ill. App. 342 (Ill. App. Ct. 1916).

Schutt v. Siems. The couple established a matrimonial home in Minnesota, where the marriage was celebrated, and under that system of law the parties had capacity. It is submitted that it was inappropriate for Illinois law, as the pre-nuptial domiciliary law of one of the parties, to void a union that did not offend the community where they actually lived, where they had the focal epicenter of their existence, and whose public interest was most affected. The application of an intended matrimonial home test as a policy sensitive panacea to govern the choice of law issue of capacity would have effected a more equitable and compelling result.

A markedly different policy base underpins relationships by marriage: a prohibited degree of relationship on the ground of affinity. Of primary concern here is maintenance of family stability.[213] Rules on affinity have developed on moral and social grounds. There is a predilection to prevent disruption within the family enclave created by marriage between stepfather and stepdaughter;[214] these unions are regarded as a blot on the escutcheon of family life with the likelihood of being highly disruptive of the former marriage of the stepfather. In similar vein, marriage between adoptive siblings might impact adversely upon the family unit, and there is a holistic concern that certain partnerships might constitute abuse of the relationship and facilitate unwelcome sexual exploitation.[215] Outside of the strictures of the stepparent and stepchild or adoptive siblings' relationships, the general rules have been tempered to allow marriage with a deceased spouse's sister or brother[216] because these relationships are less likely to egregiously disrupt the family enclave. Of more recent origin is the extension of statutory rules promulgating marriage between a divorced spouse's brother and sister.[217]

The danger of tensions within the family, such as marriage to one's former daughter-in-law, is thus the central tenet guiding the affinity principles. In the light of this implication, and to focus on the personal interests and welfare of the parties, it is submitted that the pre-nuptial domiciliary laws of both respective parties have the greatest interest in being applied. The personal law of the parties ought to be determinative on the question of the validity of the marriage compact. This contrasts with rule-

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213. *See* North, *supra* note 5, at 135.

214. *See* BROMLEY & LOWE, BROMLEY'S FAMILY LAW 37 (8th ed., 1992). *See* Marriage Act of 1949 § 1 (5).

215. *See* CLARKSON & HILL, *supra* note 16, at 320.

216. *See* Deceased Wife's Sister's Marriage Act, 1907; Deceased Brother's Widow's Marriage Act, 1921; Marriage (Prohibited Degrees of Relationship) Act, 1931.

217. *See* Marriage (Enabling) Act, 1960.

selection for consanguinity,[218] as previously considered, where public interest concerns lead to a preferred intended matrimonial test that applies the system of law of the most affected insulated community. For affinity rules, the threatened abuse of family enclaves is best left to be determined by each party's domiciliary law that governs their personal status.

The dual domicile test is well established in English law as the guiding test for issues of both affinity and consanguinity. In the context of affinity, it was clearly adopted in *Mette v. Mette*.[219] A domiciled Englishman married his deceased wife's sister in Germany, contrary to the existing affinity rules at the time.[220] They came to reside in England. It was determined that the marriage was invalid because under English law the man lacked capacity to contract such a marriage. Sir Creswell stated, "There could be no valid contract unless each was competent to contract with the other."[221] In effect, an explicit adoption of the dual domicile test for affinity matters.[222]

In the United States, no one test has pre-dominated the affinity impediment. The court in *Tyler v. Andrews*[223] was prepared to apply a place of celebration test to govern the issue. Two Maryland domiciliaries, a stepparent and stepchild, sought to circumvent the prohibition on marriage imposed by their home state by marrying in Ohio and then returning to Maryland. When the husband died his widow successfully petitioned the court to acquire a one half interest in the estate left by the deceased in the District of Columbia. The capacity to marry issue was determined by the court to be governed by Ohio law,[224] the place of marital celebration. However, in *Osoinach v. Watkins,*[225] a rule-selection test based on application of the parties' ante-nuptial domicile led to the invalidation of the marriage

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218. *See* Davie, *supra* note 12, at 53; *supra* note 209 (for contradictory views that matrimonial domicile governs both consanguinity and affinity).

219. *See generally* Mette, 1 SWTr. 416 (1859); *supra* note 187.

220. *Supra* note 215.

221. Mette, 1 S.W.Tr. at 423; *see generally* Fentiman, *supra* note 14, at 271.

222. *See* Marriage (Enabling) Act, 1960, § 1 (3) (providing explicit statutory support for a dual domicile approach). This abolished the prohibition on a woman marrying her former husband's brother, nephew, or uncle and a man marrying his divorced or deceased's wife's sister, niece, or aunt. The choice of law provision states that: "this section does not validate a marriage if either party to it is at the time of the marriage domiciled in a country outside Great Britain, and under the law of that country there cannot be a valid marriage between the parties." *Id.*

223. *See* Tyler v. Andrews, 40 App. D.C. 100 (D.C. Cir. 1913).

224. *See id.* at 103-05.

225. *See generally* Osoinach, 180 So. 577 (1938).

contract.[226] It is submitted that the approach adopted in *Osoinach* is preferable because the underlying policy bases for affinity of preventing family disruption indicates that a dual domicile perspective is optimal. In contradistinction, for consanguinity the intended matrimonial home test ought to be paramount as aesthetically it best fits the sociological, religious, and moral underpinnings of the impediment.

D. Polygamy

> The institution of marriage is intimately connected with religious, moral and social factors. In Western legal systems the principal influence to shape the accepted conception of marriage has been Christianity. The result of this has been that monogamous unions alone are permitted and polygamous relationships looked upon with disfavour. In many Eastern countries, however, where different religions and social conditions prevail, polygamy is regarded as a perfectly normal and acceptable aspect of the marriage institution. Each of these views as to the marriage relationship simply reflects different social concerns.[227]

Of paramount significance to the Anglo-American tradition of denying validity to polygamous marriages is the aim universally to prescribe the institution of monogamy.[228] A polygamous marriage where the matrimonial residence is established in England or any state in the United States will be *prima facie* struck down as offensive to the local mores of the impacted community.[229] The moral and cultural structure of our societies is based upon exclusivity of marital partnership.[230] There is a religious undercurrent to this state of affairs, which has been called upon as a justification for the ban on same sex marriages, bigamy, and polygamous unions.[231] In Eastern countries, as the above quotation indicates, different

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226. A marriage took place in Georgia between two Alabama domiciliaries. *See id.* They sought to evade the extant prohibition under Alabama law of a marriage of a man to his uncle's widow. *See id.*

227. *See* Davie, *supra* note 12, at 50.

228. *See* Jaffey, *supra* note 41, at 39.

229. *See id.*

230. *See* MCCLEAN, *supra* note 16, at 172-78, NORTH & FAWCETT, *supra* note 16,at 617-626.

231. *See* North, *supra* note 5, at 136.

religions and social conditions are prevalent which makes polygamous marriage a perfectly acceptable form of institution.[232] It seems to be self-evident that the state with the most important interest in whether monogamous or polygamous relationships are permissible is the very state where the matrimonial residence is established.[233] This is the community which is most affected by the union, which has to deal with the incidents of the parties' status, and which has to cope with a marriage beyond the confines of prevailing social mores.

The English and United States prohibitions against polygamy are designed to safeguard the traditional marriage family structure. It is overwhelmingly a rule molded to protect the public interests of the state as set against the personal interest of the parties.[234] The intended matrimonial home is the community that avowedly has the greatest concern in the status and validity of the marriage. In this context it is important to further assess the extent of the orthodox Anglo-American choice of law principle. Is it the purpose of the rule to deny validity to a polygamous union where a domiciliary never establishes a matrimonial home within state borders? One suggests that it be outside the ambit of legitimate interest to impose monogamy on foreign communities, even where one of the parties is a domiciliary of the forum state. To impose such a restrictive encumbrance demonstrates a palpable breach of international comity and a lack of respect for prevalent local culture. Such a restriction is unmeritorious to an unacceptable degree. Consider, for instance, a hypothetical situation where a New York woman wishes to contract a polygamous marriage with an Egyptian man, the matrimonial residence to be set up in Cairo. It would show a contumelious disregard of Eastern values, their religions, social, and moral infrastructure, to declare such a union invalid. In any event, the New York domicile will be lost soon after the marriage with the acquisition of an Egyptian domicile of choice. What purpose is served in applying a rigid invalidating dual domicile rule, dependent upon the factually irrelevant acquisition of a new governing domicile either immediately before or after the marriage celebration?[235]

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232. *See id.*, *see also* CLARKSON & HILL, *supra* note 16, at 235-37.

233. *See* Jaffey, *supra* note 41, at 39-41.

234. *See id.* at 42.

235. *See generally* Sebastian Poulter, *Hyde v. Hyde: A Reappraisal*, 25 INT'L & COMP. L.Q. 475 (1976). The radical suggestion is that the polygamous nature of *any* marriage contracted in a foreign country by an English domiciliary should be disregarded in the determination of its validity for the purposes of English law. *See id.*

The intended matrimonial home test is the optimal solution for this issue of capacity.[236] The crucial focus should be on the country where the married couple intend to live.[237] A choice of law will consequentially be applied which has the greatest interest to the incumbent character of the marriage contract, which shows primary concern with the physical and legal attributes of the individuals, not the historical system that adhered to them in advance of the ceremony. The meritorious touchstone of an intended matrimonial home test was clearly expounded by the English Royal Commission on Marriage and Divorce back in 1956 in the following terms:

> The status of marriage pre-eminently affects society in the country where the parties live together as husband and wife. That country represents what has been called the "true seat of the marriage relation", and it seems socially undesirable that a union which is regarded there as not detrimental to the community should be pronounced void, simply because one or other or both of the parties were formerly connected with a country in which a different view prevails.[238]

Although there is broad English support for a dual domicile test to be applied to all aspects of capacity, nonetheless there is some recognition, albeit only at first instance, for applying the intended matrimonial home test to determine capacity to enter a polygamous marriage. *Radwan v. Radwan (No. 2)*[239] provides an explicit template, on a social justice basis, for recategorization of the issue of polygamy.[240] In *Radwan,* a domiciled Englishwoman married a domiciled Egyptian in polygamous form at the Egyptian Consulate General in Paris. This marriage was not only potentially but also actually polygamous, for in the previous year the husband had

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236. Jaffey has propounded the following rule selection test: "a polygamous marriage is invalid if, and only if, it is invalid by the law of either party's domicile at the time of the marriage, provided that it is not invalid if, within a reasonable time of the celebration of the marriage, the parties establish a matrimonial home in a country by the law of which the marriage is valid." Jaffey, *supra* note 41, at 42. A dual domicile test prevails where no matrimonial home is established within a reasonable time frame. *See id.*

237. *See generally* Fentiman, *supra* note 14, at 256; Smart, *supra* note 14, at 225.

238. Cmd. 9678, para 889.

239. *See generally* Radwan, [1973] Fam. 35; *supra* note 44.

240. Many academics criticize the decision. *See generally* J.A. Wade, *Capacity to Marry: Choice of Law Rules and Polygamous Marriages,* 22 INT'L & COMP. L.Q. 571 (1973); Karsten, *supra* note 53; David Pearl, *Capacity for Polygamy,* CAMBRIDGE L.J. 43 (1973). *But see* Jaffey, *supra* note 41; Stone, *supra* note 43 (providing support for the decision.)

married his first wife in Egypt by Islamic rites. The couple established their matrimonial home in Egypt, as they had intended at the time of marriage, but five years later they moved to live in England.[241] The union was fruitful in the sense that eight children were born to the couple. Thereafter, the husband purported to divorce his second wife by means of a Jewish religious divorce process by serving the ghet at the Egyptian Consulate General in London. In turn the wife petitioned the English court for a divorce. Directly raised, therefore, was the question of the capacity of an English domiciliary to enter into an actually polygamous marriage. It was determined by the court that the intended matrimonial home theory governed the issue, rejecting authorities that asserted that capacity was governed by the law of each party's ante-nuptial domicile, and asserting instead that the propositus "had capacity to enter into a polygamous union by virtue of her pre-nuptial decision to separate herself from the law of her domicile and make her life with her husband in his country, where the Mohammedan law of polygamous marriage was the normal institution of marriage."[242]

The outcome in *Radwan* was socially just because Egyptian law was the system of law that was determinative, the parties had lived together for a significant number of years in that country, and both believed for over 19 years that their union was valid evidenced by the birth of eight children under that prevailing assumption. English susceptibilities were not affected as they only lived together in the community after the husband's divorce from his first wife.[243] In rejecting the traditional dual domicile approach,[244] the judgement of the court was subjected to hostile academic comment,[245] a response evidently anticipated.[246]

As an example of functional recategorization to achieve a preferred outcome, *Radwan* is to be applauded. The policy sensitive application of an intended matrimonial home test, obviating rigid jurisdiction-selection, and applying depecage principles to a specific compartmentalized capacity issue, represents a Utopian settlement on public interest grounds. It raises a vignette for future development, a standard bearer for the facilitation of

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241. Prior to the move to England, the husband had divorced his first wife. *See* Radwan, [1973] Fam.

242. *Id.* "Nothing in this judgment bears upon the capacity of minors, the law of affinity, or the effect of bigamy upon capacity to enter a monogamous union." *Id.*

243. *See* North, *supra* note 70, at 29.

244. *See generally* Glenn *supra* note 46 (applying a via media).

245. *See supra* note 239.

246. *See* Radwan, [1973] Fam. at 54.

greater flexibility producing higher levels of social justice, but without departing in too great an extent from the necessary certainty in rule formulation required by all interested parties in the capacity equation.

Shortly after the decision in *Radwan*, section 11(d) of the Matrimonial Causes Act 1973 came into force. It states: "A marriage celebrated after the 31st July 1971 shall be void on the following grounds: (d) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales." This provision, read by itself, seems to exclude the possibility of an English domiciliary entering into a valid polygamous marriage, even in a scenario where the matrimonial home is a country permitting polygamy.[247] However, the antidote of section 14 (1) of the same Act may temper the intransigence that is implicated by the section.[248] In effect, the terms of section 14 (1) provide that section 11 will only be applicable to invalidate a marriage where, according to the rule of private international law, the validity of the union falls to be tested by English law. The consequence is that section 11 does not apply if the marital validity is determinable by a foreign law. This interpretation means that section 11(d) is not a conflicts rule. Instead, it is constrained to simply being a purely English domestic rule that is only applicable under common law where English law is the governing law. Read in conjunction with section 14 the efficacy of section 11 (d) is limited and will not preclude the validity of a polygamous marriage where one of the parties is domiciled in England. This will apply provided that the matrimonial home is other than England. If England is the intended matrimonial home, then a polygamous marriage will be invalid even in a situation where both parties were domiciled in an Eastern country when they celebrated the new marriage.[249]

The United States choice of law rules have demonstrated an impregnable denial of polygamous marriages contracted within the forum.[250]

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247. § 11(d) of the Matrimonial Causes Act, 1973 was not applicable to the marriage in *Radwan* which occurred in 1951. This Act is only relevant to a marriage celebrated after July 31, 1971.

248. *See* NORTH & FAWCETT, supra note 16, at 619

249. *See generally* Hussain v. Hussain [1983] Fam. 26. Academics have criticized the decision. *See* P.B. CARTER, THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 1982, 298 (1983); *see generally* Adrian Briggs, *Polygamous Marriages and English Domiciliaries*, 32 INT'L COMP. L.Q. 737 (1983); David Pearl, *Polygamy for English Domiciliaries?*, 42 CAMBRIDGE L.J. 26 (1983); Rhona Schuz, *When is a Polygamous Marriage Not a Polygamous Marriage?*, 46 MOD. L. REV. 653 (1983); Sebastian Poulter, *Polygamy–New Law Commission Proposals*, 13 FAM. L. Q. 72 (1983).

250. *See supra* note 89; *Earle*, 126 N.Y.S. 317 (1910).

The propagation of monogamous relationships has generally reigned supreme.[251] This denial of subsidiarity has also infected the treatment of the incidents of polygamous marriages where the matrimonial residence is established outside state territorial borders.[252] An unwelcome manifestation of this unenlightened orthodoxy is represented by the unfortunate treatment prescribed to children of polygamous marriages of United States residents contracted in China. In two federal cases, *De Sylva v. Ballentine*[253] and *In re Look Wong*,[254] the courts refused to recognize the effectuality of such relationships for immigration purposes.

In re Look Wong was the earlier of the two authorities. The husband, an American resident, returned to China and married a second wife, a Chinese domiciliary, during the subsistence of his first marriage. Thereafter, a son of this second marriage sought to enter the United States as a "child" of the United States-resident father, under the extant provisions of the applicable immigration statute. This application was contumeliously rejected by the United States District Court for the District of Hawaii.[255] In the leading judgement, Judge Clemons asserted that the polygamous relationship that effected the immigrant's claimed status, "contravenes the spirit and policy of our laws and institutions."[256] By ingenuous sleight of hand, the "laws and institutions" of the interested state were equated to the amorphous concept of the principles underlying the systems of family law of all of the states of the union. In essence, federal law was superimposed as a conduit for the universal imposition of recognition being accorded to purely monogamous relationships.

With respect, the decision of the District Court in *In re Look Wong* reveals an appallingly insensitive breach of international comity, and a lack of recognition for the disparate social and religious mores prevailing in a foreign legal system. The decision, which effectively denied any recognition to the incidents of a polygamous marriage relationship, was predicated upon the touchstone of the pre-nuptial domiciliary law of the United States resident abrogating any validity to the marriage contract. On subsidiarity grounds, a more compelling rule-selection would have been the preferred

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251. *See* Maddaugh, *supra* note 4, at 124.

252. *See* Fine, *supra* note 15, at 49-50.

253. *See* De Sylva v. Ballentine, 351 U.S. 570 (1956).

254. *See In re* Look Wong, 4 U.S. Dist. Ct. Hawaii 568 (1915); *see also* Ng Suey Hi v. Weedin, 21 F.2d 801 (9th Cir. 1927).

255. *See* Fine, *supra* note 15, at 49.

256. *See id.*

intended matrimonial home test, leading to application of the Chinese system of law by whose terms the second marriage was perfectly valid with legitimate offspring. In a similar factual matrix in *Radwan*, involving a pre-nuptial domiciliary of the forum contracting a polygamous marriage valid by their intended matrimonial residence, the efficacious outcome was to uphold the validity of the relationship. Social justice requirements in *In re Look Wong* indicated that the immigration provisions ought to have been satisfied.

The preferred solution for this capacity issue is to adopt an intended matrimonial home test as the community most publicly affected by the establishment of the polygamous relationship. Two further questions, however, need to be addressed in this context. First, consider the case where the parties to a polygamous marriage celebrated in an Eastern country are domiciled there at the time of marriage celebration, but settle in the United States (or England) soon after the marriage. By application of dual domicile theory, the marriage is valid, but should it be invalid on the basis that it infringes the public policy of the forum? It is submitted that despite an underlying policy concern of promoting marital validity where possible, in such factual circumstances the intended matrimonial home test should nonetheless still be determinative. Polygamy is contrary to the religious beliefs and customs of the community that they have voluntarily infiltrated; no injustice is done to the respective parties in applying that system of law to determine their status.[257] Of course, it will be otherwise if the parties reside for a reasonable period of time in the former Eastern country by whose laws they have contracted a valid polygamous marriage.

This leads to the second related question of what constitutes a "reasonable time" in this context; the connotation itself is undoubtedly vague. There is little difficulty in delineating between periods of ten years as opposed to ten days of habitation, but other time frames may be more problematic. It is submitted, however, that this difficulty is not insurmountable. In practice it will be a rare case where there is a long delayed establishment of a matrimonial home. By adopting a common sense perspective a court will lean in favor of holding a time period as reasonable if the consequence of that decision will not precipitate undue complications or problems as to the status of the relevant individuals or affect rights of

257. *But see* Jaffey, *supra* note 41, at 40 (suggesting that public policy in England and the United States should tolerate a polygamous marriage even where the parties come to live in England. This is on the premise that the marriage is in accordance with the mores of the parties community when they married).

succession.[258] Overall the intended matrimonial home test for polygamous relationships, despite some attendant difficulties in very limited cases, is to be commended as the functional rule-selection approach for this compartmentalized area.

E. Consent

A marriage will be invalid for lack of consent in circumstances where the apparent consent was vitiated by some defect such as duress, fraud, mistake, or unsoundness of mind.[259] There is a lack of intention to effectuate a valid marriage contract.[260] Outside of these traditional grounds of consent, there co-exists an agglomeration of disparate physical impediments;[261] a marriage may be voidable on account of impotence,[262] wilful refusal to consummate,[263] pregnancy *per alium*, venereal disease unknown to the other party, sterility, and mistake as to attributes.[264] In such a scenario, an individual is thrust into an imperfect marriage that they have not bargained for, and cavills against this unwelcome state of affairs.

The underlying premise for the impediment of lack of true consent, in both types of situations, is to safeguard the aggrieved party from the consequences of their misapprehension and confusion.[265] There is a subtle nuance in the underlying policy bases for these rules, which embodies a fudged compromise between conflicting domestic policies. On one side of the coin it is implicit that it is morally indefensible and socially ineffectual that a true and valid consent to marriage has been precluded. On the other end of the spectrum, it is important to uphold the reasonable expectations of the other marital partner and the sanctity of the marriage contract.[266] The

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258. *See generally* Stone, *supra* note 43.

259. *See generally* NORTH & FAWCETT, *supra* note 2, at 646-47; MCCLEAN, *supra* note 16, at 166-67; CLARKSON &HILL, *supra* note 16, at 333-35.

260. *See* Hartley, *supra* note 5, at 579.

261. *See* Davie, *supra* note 12, at 54.

262. In the United States, if the petitioner knew or ought to have known of the impotence then annulment will be refused. *See* CLARK, LAW OF DOMESTIC RELATIONS 10 (1968).

263. *See generally* W.D. Bishop, *Choice of Law for Impotence and Wilful Refusal*, 41 MOD. L. REV. 512 (1978), LENNART PALSSON, MARRIAGE IN COMPARATIVE CONFLICT OF LAWS 312-13 (1981); NORTH, THE PRIVATE INTERNATIONAL LAW OF MATRIMONIAL CAUSES IN THE BRITISH ISLES AND THE REPUBLIC OF IRELAND 126 (1977).

264. *See* Palsson, *supra* note 262, at 305.

265. *See* Hartley, *supra* note 5, at 579.

266. *See id.*

tensions between these competing policies have determined that the boundaries on the constituents of lack of consent in Anglo-American law are strictly construed. This means, for instance, that a simple mistake as to the financial standing and social pre-eminence of the other spouse does not constitute a binding ground for acquisition of a nullity decree, nor does threatened social or penury bankruptcy.

The most affected state in the consent equation, which has the greatest concern in protecting the denuded party from the effects of defective consent, will be the pre-nuptial domiciliary law of that individual immediately prior to the marriage celebration. In essence, it would be futile to unwillingly hold such an individual embedded to a marriage, which according to the tenets of his own community is defective.[267] That community, which governs his personal status, is most implicated in effecting the well-being of their own domiciles, and the aggrieved party should have the degree of protection accordingly laid down by their own personal law. This meets with the reasonable expectations standard in that whether a marriage is defective or not can legitimately be tested by the party's community to which he belongs at the time of the marriage ceremony.[268] The focus of the policy sensitive analysis herein is to suitably protect an aggrieved party, and unlike the impediments of consanguinity and polygamy, is not to propagate the public interest requirements of the established matrimonial residence.

For this category in the pantheon of essential validity, the intended matrimonial home test seems wholly devoid of merit. The preferred option of pre-nuptial domiciliary law needs to be adopted in a salutary fashion. In circumstances where the marriage relationship is not defective by the petitioner's own personal law, it would be fallacious for him to superimpose attenuated protection through reliance on principles conferred by the law of the other party's domicile, at some third state law. Governance of these issues ought to be in accordance with the extant personal law of the allegedly non-consenting party, with the stipulated grounds only subsisting in favor of that particular individual.[269] The extent to which such a rule-selection test is apposite is thrown into even sharper relief by considering the two leading

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267. *See* Jaffey, *supra* note 41, at 48; Davie, *supra* note 12, at 60-61.

268. *But see* Arthur Taylor von Mehren, *Choice of Law and the Problem of Justice*, 41 LAW & CONTEMP. PROBS. 27, 34 (1977); P.R.H. Webb, *Shot-Gun Marriages and the Conflict of Laws*, 22 MOD. L. REV. 198, 203 (1959).

269. *See* Horowitz, *supra* note 104, at 755. In true conflicts cases, the determinative choice of law ought to be that which has the most intense interest vis à vis the disputed issue. *See* Davie, *supra* note 12, at 61.

Anglo-American authorities on consent, those of *Fusco v. Fusco*[270] and *Szechter v. Szechter.*[271]

In *Fusco,* the petitioner, a native of Syracuse, New York, went to Italy in 1937 to study medicine, and in 1942 he married an Italian domiciliary. He was immediately called up for service in an Italian military hospital, after the conclusion of his wedding and remained in Italy after the war until August 1946. On his return to Syracuse, he filed for an annulment of the marriage on the basis that he had entered it under duress. His evidence was that he had gone to Italy only to study medicine, intending at all times to return to Syracuse, but he had married an Italian domiciliary under coercion. He claimed that she and members of her family threatened that if he did not marry her they would send him to a concentration camp as an enemy alien. He also contended that the couple had never voluntarily cohabited. In reply, the respondent appeared by counsel, confirming the residence of the defendant and the existence of the marriage, but otherwise entering a general rebuttal to the duress claim.

The Supreme Court of New York found in favor of the petitioner. The court congratulated him for demonstrating sufficient foresight to avoid, "such a demoniac place of torture" as an Italian concentration camp.[272] In applying the extant personal law of the non-consenting party, the law of the New York domiciliary, the outcome accords with the preferred solution propounded for this capacity issue. This was the system of law which had the primary interest in its rule being applied, a rule designed to prevent unwilling individuals from being coerced into the bonds of matrimony.

Further examination of the case, however, reveals a totally convoluted and opaque reasoning being applied by the court.[273] Two additional grounds were posited for nullity. First, is a principle applicable to marriage contracts in the same vein as general commercial contracts. "[D]uring the tendency of a state of war valid contracts cannot be made between citizens of the respective nations."[274] The second ground was the failure of the petitioner to produce a "certificate of no impediment" from his national authority at the time of the ceremony. This was asserted to be a

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270. *See* Fusco v. Fusco, 107 N.Y.S.2d 286; 288 (Sup. Ct. 1951); Baade, *supra* note 15, at 373-77.

271. *See* Szechter v. Szechter, 2 W.L.R. 170 (Eng. 1971).

272. *See Fusco*, 107 N.Y.S.2d at 288.

273. *See* Baade, *supra* note 15, at 374-76.

274. *See Fusco*, 107 N.Y.S.2d at 288-89.

prerequisite in accordance with article 116 of the Italian Civil Code.[275] As Baade, has previously stated,[276] neither of these grounds can withstand judicial scrutiny. To the extent that they are extraneous to the legitimate result in the case they should be disregarded.[277]

Of similar doubtful merit is the application of the Second Restatement formula to this case. The validating *lex loci* formula of section 283 (2) would point to the adoption of Italian law being applied, unless it is excluded by the exception as violating the "strong public policy" of New York under the most significant relationship test. A classic conflicts dilemma exists with Italian law interested in extending to the respondent the benefits of their strict rule preserving matrimonial ties. New York law points in the opposite direction by allowing the aggrieved petitioner its protection against coercion and duress.[278] To refer to "most significant relationship" in such a true-conflict seems meaningless. This can be avoided through the optimal rule-selection technique of applying the pre-nuptial domiciliary law of the allegedly non-consenting petitioner; an aroma of inclusively for this principle needs to be disseminated.

In English law, the rigid dual domicile test holds sway over the issue of the consent of the parties.[279] This is evident in the leading case of *Szechter v. Szechter*,[280] in which the parties had to endure political persecution and anti-Semitism in Poland. A couple had married in Poland, the country of their common domicile. This marriage had been entered into to secure the women's release from political detention; she had been sentenced to three

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275. *See id.* at 288.

276. *See* Baade, *supra* note 15, at 374-76. The first ground is refused on the basis that it is of marginal consequence—authority existed to the effect that a marital contract was outside the ambit of the rule. *See* Fasbender v. Attorney-General 2 Ch. 850, 858 (1922), SIR ARNOLD DUNCAN MCNAIR, LEGAL EFFECTS OF WAR 131 (3rd ed., 1948).

277. The second ground was a *brutum fulmen* in that the production of a legally unobtainable New York document would have added nothing if available. *See* Baade, *supra* note 15, at 374-77.

278. *See* Baade, *supra* note 15, at 376-77.

279. This is certainly the case for the traditional consent grounds of duress, fraud, and mistake. *See* Way [1950] P. 71, at 78-79; *see generally* Kenward [1950] All E.R. 297. More opaque is the opposite test for the other disparate physical impediment grounds such as impotence and wilful refusal. *See generally* Easterbrook v. Easterbrook [1944] P. 10; Hutter v. Hutter [1974] P. 95 (adopting the lex fori); *see* Robert v. Robert [1947] P. 1643; Addison v. Addison [1955] N. Ir. 1, 30 (for the lex loci calebrationis); *see* Ponticelli v. Ponticelli [1958] P. 204 (applying the law of the husband's domicile); *see* De Reneville v. De Reneville [1948] P. 100 (applying a governing intended matrimonial home test).

280. *See* 2 W.L.R. 170 (1971); *see generally* Hartley, *supra* note 5.

years imprisonment for anti-state activities. Because of her failing health and the ill-treatment received in prison, she was frightened that she would not survive the term. Dr Szechter, a well-known Polish historian who was also a Jew, had, together with his wife, treated the girl almost as a child of the family. She had been persecuted at the hands of the Nazis. He divorced his first wife to marry her so that she could accompany him out of the country. Subsequently, the parties came to England and petitioned the court for a decree of nullity on the basis of duress. Sir Jocelyn Simon held that she had not consented.[281] The justice of the case undoubtedly demanded that this result be achieved. Hence, the husband could remarry his first wife as intended. However, less praiseworthy was Sir Jocelyn's apparent endorsement of the dual domicile theory to matters of consent, adopting Dicey's rule that the essential validity of a marriage was referable to the law of both parties' pre-nuptial domicile. In effect, this means that one party can rely on lack of consent under the existing provisions of the other party's domiciliary law.

It is submitted that the position adopted in *Szechter*, which has not been resiled from, is over-broad and countermines the underlying policy basis of consent to give paramountcy to protection of the aggrieved party by applying their extant personal law. It is they and they *alone* in whose favor the stipulated grounds ought to exist.[282] If an individual is not entitled to the protection accorded by the law of his own country, then policy concerns do not extend to protection conferred by another system of law. This represents an implicit rule-selection value judgement that it is more egregious to hold a person to a marriage relationship that is defective by their personal law, than to remove marital status from the other party under whose laws no impediment exists.[283] It is submitted that for consent, of either the traditional or disparate physical impediment kind, the preferred determinative law is that of the petitioner's domicile at the very time of the marriage. Here again depecage principles should be operative in Anglo-American law to compartmentalize a specific category of invalidity.

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281. *See id.* at 177; *see generally* H v. H [1954] P. 258, Parojcic v. Parojcic 1 W.L.R. 1280 (P. 1958); Buckland v. Buckland [1968] P. 296.

282. *But see* Hartley, 35 MOD. L. REV. 571, 581 (1972) (asserting that provided the parties consent by English law, the marriage should be valid unless no consent exists by the law of both parties' domiciles; an alternative reference test explicitly promulgating marital validity).

283. *See* Jaffey, *supra* note 41, at 48.

IV. CONCLUSION

This article has been dedicated to the theme that choice of law rules for essential validity can best be appreciated in the light of their underlying policy-sensitive values. The rigid jurisdiction-selection approaches of dual domicile under English law and place of celebration in the United States need to be overridden by reformation of certain and predictable choice of law rules which are crafted to mold into the specific needs of each issue. The five main impediment grounds have been considered sequentially by adopting a comparative analysis of leading Anglo-American jurisprudence in order to develop narrow optimal rules, each tailored to fit the compartmentalized issue. Interest analysis is propounded, not on an *ad hoc* case by case basis that has infected the American choice of law principles for tort and contract,[284] but within a structured confined framework to itemized topics. Rules need to be certain and precise in this area to enable the parties to prophylactically determine the outcome of state validating or invalidating rules to particular incapacity grounds; dated rule-skepticism is consequentially obviated. Marriage validity is an eminently apposite subject for the application of a modified interest analysis theory, on depecage principles, to delineate between identifiable community interest in regulating parties who establish a matrimonial residence within their state borders, as opposed to the countervailing personal interests of the respective parties. The policy-sensitive values of the former impinge to a greater degree on impediments of polygamy, consanguinity, and divorce recognition; the latter has paramountcy for affinity, non-age, and consent.

In this recategorization of rule formulation there is arguably a *douceur de vivre*, an element of greater flexibility that promotes greater justice, but does not sacrifice the required element of predictability essential to matters of personal status. This perspective has, it must be duly admitted, provoked a number of dissenting voices throughout the Commonwealth. Sykes and Pryles, leading Australian commentators, have strongly intimated that the idea that, "different aspects of capacity may be governed by different choice of law rules is hardly to be welcomed."[285] In England, the recategorization of divorce primacy over capacity provoked the following caustic response by Carter: "a position devoid of policy justification and one which could permit unwarranted (and often absurdly pretentious) assertions

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284. *See supra* note 13.

285. *See* EDWARD I. SYKES & MICHAEL C. PRYLES, AUSTRALIAN PRIVATE INTERNATIONAL LAW 428 (3rd ed., 1991).

of extra-territoriality abhorrent to international comity."[286] This view has been replicated by the English Law Commission in a hypersensitive reaction to the proposed creation of a separate intended matrimonial home test for capacity to effect a polygamous marriage, rather than orthodox dual domicile theory:

> On the assumption that *Radwan v Radwan (No. 2)* was correctly decided, the question of capacity to enter into a polygamous marriage is governed by the law of the parties' intended matrimonial home. However, other issues of capacity, such as consanguinity, affinity and bigamy, are, on the basis of the existing authorities, governed by the dual domicile test. Thus, if Mrs Radwan had been the niece of Mr Radwan the marriage would have been held to be void. A woman's capacity to marry her uncle raises the same sort of issues as her capacity to marry a man who is already married, and it is difficult to see what social or policy factors there are for applying different choice of law rules in these two situations.[287]

Ultimately, it is submitted that the above criticisms are over-cautious and over-dramatic in their knee-jerk reaction against functional re-categorization. The current parlous state of our law, confused and obscure in its treatment of essential validity, needs to be reformulated for the next millennium. A new momentum is required to re-examine a subject that has been, in the main, scandalously neglected on both sides of the Atlantic.

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286. *See* CARTER, *supra* note 164, at 444.

287. LCWP No. 89 (1985), at para 3-26.